EUGENE WILLIAM DONLAN, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54689

April 28, 2011 249 P.3d 1231

Appeal from a district court order denying a petition to terminate appellant's duty to register as a sex offender under NRS 179D.490. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Defendant filed a petition to terminate his requirement to register as a sex offender in Nevada on ground that the requirement to register as a sex offender in California had since been terminated by an executive branch administrative action of that state. The district court denied defendant's petition to terminate his duty to register as a sex offender in Nevada, and he appealed. The supreme court, CHERRY, J., held that Full Faith and Credit Clause did not require Nevada to dispense with its preferred mechanism for protecting its citizenry by virtue of termination of the duty to register as sex offender in another state, and thus, defendant had to continue to register as sex offender in Nevada.

Affirmed.

Terrence M. Jackson, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City, and *Binu G. Palal*, Deputy Attorney General, Carson City, for Respondent.

1. MENTAL HEALTH; STATES.
   Full Faith and Credit Clause did not require Nevada to dispense with its preferred mechanism for protecting its citizenry by virtue of termination of the duty to register as sex offender in another state, and thus, defendant, who was convicted of a sex offense in California and who now resided in Nevada, had to continue to register as a sex offender in Nevada, even though the requirement to register as a sex offender in California had since been terminated by an executive branch administrative action of that state; California lacks the power to dictate the means by which Nevada can protect its public from a convicted sex offender. U.S. CONST. art. 4, § 1.
2. JUDGMENT.
   Regarding judgments, the full faith and credit obligation is exacting: a final judgment in one state, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. U.S. CONST. art. 4, § 1.
3. JUDGMENT; STATES.
   While there is not a roving public policy exception to the Full Faith and Credit Clause of the Federal Constitution concerning judgments, the same cannot be said for public acts, records, and statutes. U.S. CONST. art. 4, § 1.

4. JUDGMENT; STATES.
   Purpose of the Full Faith and Credit Clause is to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin. U.S. CONST. art. 4, § 1.
5. STATES.
   Full Faith and Credit Clause cannot be used by one state to interfere impermissibly with the exclusive affairs of another. U.S. CONST. art. 4, § 1.
6. STATES.
   Full Faith and Credit Clause does not compel a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate. U.S. CONST. art. 4, § 1.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, J.:

In this appeal, we consider whether someone convicted of a sex offense in another state who now resides in Nevada must continue to register as a sex offender in Nevada even though the requirement to register as a sex offender in the other state has since been terminated by an executive branch administrative action of that state. We conclude that the Full Faith and Credit Clause does not require Nevada to dispense with its preferred mechanism for protecting its citizenry by virtue of termination of the duty to register in another state. Accordingly, we affirm the district court's order denying appellant's petition to terminate his duty to register as a sex offender in Nevada.

FACTS

In August 1985, appellant Eugene W. Donlan pleaded guilty to the crime of lewd and lascivious behavior on a child in California and was sentenced to probation. According to Donlan, his probation was subsequently terminated, the charges against him were reduced to a misdemeanor, and the conviction was later dismissed and set aside under California statutory law.

In March 1986, Donlan began registering as a sex offender in the State of California. In December 2005, he moved to Gardnerville, Nevada. He has since relocated to Pahrump, Nevada. Donlan has continually registered with the State of Nevada as a sex offender since moving to this state. In July 2009, almost 25 years after his conviction, the California Department of Justice, under

the auspices of the California Attorney General, terminated Donlan's requirement to register in California as a sex offender through a notification letter.

Thereafter, Donlan filed a petition in the Fifth Judicial District Court in Nye County, Nevada, to terminate his requirement to register as a sex offender in the State of Nevada, which was opposed by the Nevada Attorney General. In September 2009, after a hearing was held on the petition, the district court denied Donlan's petition to terminate his duty to register as a sex offender in the State of Nevada. On appeal, Donlan contends that the district court abused its discretion in denying his petition to terminate his duty to register as a sex offender.

DISCUSSION

[Headnote 1]

Donlan argues that the Full Faith and Credit Clause of the United States Constitution requires Nevada to recognize California's termination of his requirement to register as a sex offender. We disagree because California ''lacks power to dictate the means by which [Nevada] can protect its public.'' *Rosin v. Monken*, 599 F.3d 574, 577 (7th Cir. 2010).

[Headnotes 2-5]

The Constitution requires that ''Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.'' U.S. Const. art. IV, § 1; *see Nevada v. Hall*, 440 U.S. 410, 421 (1979); *Mason v. Cuisenaire*, 122 Nev. 43, 47, 128 P.3d 446, 448 (2006). ''The purpose of the Full Faith and Credit Clause ' ''was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.'' ' '' *Rosin*, 599 F.3d at 576 (quoting *Baker v. General Motors Corp.*, 522 U.S. 222, 232 (1998) (quoting *Milwaukee County v. White Co.*, 296 U.S. 268, 277 (1935))). While it is clear that the California executive branch administrative decision based on California statutory law is not a final judgment under the Full Faith and Credit Clause, we need not decide whether California's decision to terminate Donlan's duty to register is a public act or record because the Supreme Court has ''clearly establishe[d] that the Full Faith and Credit Clause does not require a State to apply another

State's law in violation of its own legitimate public policy.'' *Hall*, 440 U.S. at 421-22.[1] The Court has reasoned that ''the full faith and credit clause does not require one state to substitute for its own statute, applicable to persons and events within it, the conflicting statute of another state, even though the statute is of controlling force in the courts of the state of its enactment.'' *Pacific Ins. Co. v. Comm'n*, 306 U.S. 493, 502 (1939); *see Hall*, 440 U.S. at 422-23. Therefore, ''the Full Faith and Credit Clause cannot be used by one state to interfere impermissibly with the exclusive affairs of another.'' *Rosin*, 599 F.3d at 577; *see Baker*, 522 U.S. at 239 n.12 (holding that Michigan judgment was not entitled to full faith and credit because it impermissibly interfered with Missouri's control of litigation brought by parties who were not before the Michigan court).

[Headnote 6]

Even if California imposes less restrictive requirements upon sex offenders, ''[California] has no authority to dictate to [Nevada] the manner in which it can best protect its citizenry from those convicted of sex offenses.'' *Rosin*, 599 F.3d at 577. ''The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.' '' *Baker*, 522 U.S. at 232 (quoting *Pacific Ins. Co.*, 306 U.S. at 501); *see Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 494 (2003) (''The State of Nevada is undoubtedly 'competent to legislate' with respect to . . . one of its citizens within its borders.''). As such, Nevada does not need to dispense with its preferred mechanism for protecting its populace by virtue of a California executive branch administrative action that terminated Donlan's requirement to register as a sex offender. *Rosin*, 599 F.3d at 577; *see Clint Hurt & Assocs. v. Silver State Oil*, 111 Nev. 1086, 1088, 901 P.2d 703, 705 (1995). To the contrary, the California action only assures Donlan that he does not have to register as a sex offender within the jurisdiction of California. *See Rosin*, 599 F.3d at 577. That notwithstanding, Nevada is free to protect its populace from individuals convicted of sex offenses by enforcing its own registration requirements. *See ASAP Storage, Inc. v. City of Sparks*, 123 Nev.

[1]''Regarding judgments . . . the full faith and credit obligation is exacting[:] A final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land.'' *Baker*, 522 U.S. at 233; *see Adams v. Adams*, 107 Nev. 790, 792, 820 P.2d 752, 754 (1991) (''The full faith and credit doctrine requires each state to give effect to the judicial proceedings of other states.''). While there is not a roving public policy exception to the Full Faith and Credit Clause concerning judgments, the same cannot be said for public acts, records, and statutes. *Finstuen v. Crutcher*, 496 F.3d 1139, 1152 (10th Cir. 2007) (''In applying the Full Faith and Credit Clause, the Supreme Court has drawn a distinction between statutes and judgments.'').

639, 646 n.15, 173 P.3d 734, 739 n.15 (2007) (recognizing that the Legislature's police power is essential for the protection and preservation of the public safety); *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 559, 170 P.3d 508, 513 (2007) (''Police power confers upon the states the ability to enact laws in order to protect the safety, health, morals, and general welfare of society.'').

Because California lacks the power to prescribe the manner in which Nevada can protect its citizenry, we affirm the district court's order denying Donlan's petition to terminate his duty to register as a sex offender.[2]

DOUGLAS, C.J., and SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

AMERICAN ETHANOL, INC., A NEVADA CORPORATION; AND AE BIOFUELS, INC., A NEVADA CORPORATION, APPELLANTS, *v.* CORDILLERA FUND, L.P., A TEXAS LIMITED PARTNERSHIP, RESPONDENT.

No. 54779

May 5, 2011 252 P.3d 663

Appeal from a district court judgment in a corporations action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Dissenting shareholder filed appraisal action against acquired and surviving corporations. The district court entered judgment on a jury verdict finding that shareholder had timely exercised its right

[2]NRS 179D.490, the statute governing the duration and termination of a sex offender's duty to register, was amended in 2007 in Assembly Bill (A.B.) 579. 2007 Nev. Stat., ch. 485, § 41, at 2770-71. The new sex offender registry requirements were to go into effect in July 2008. *Id.* § 57, at 2780. However, the United States District Court for the District of Nevada preliminarily and then permanently enjoined the State of Nevada from enforcing the new requirements of Nevada's sex offender registration laws, including those in NRS 179D.490, in *American Civil Liberties Union v. Cortez Masto*, 719 F. Supp. 2d 1258 (2008) (enjoining the enforcement of A.B. 579, which included amendments to NRS 179D.490). The permanent injunction has been appealed to the Ninth Circuit Court of Appeals and a decision has not been rendered. The parties and the district court did not have an opportunity to determine the appropriateness of NRS 179D.490 as a consequence of the injunction. In this appeal, Donlan also argues that NRS 179D.490 is constitutionally defective because it does not provide a remedy for a person in his position, and that NRS 179D.490 violates the Equal Protection Clauses of both the United States and Nevada Constitutions. Since the amendments to NRS 179D.490 have been permanently enjoined, we do not reach the merits of these questions.

to dissent, and after a bench trial, entered judgment for shareholder. Corporations appealed. The supreme court, CHERRY, J., held that: (1) in a statutory appraisal proceeding, both sides had the burden of proving their respective valuation positions; (2) the district court was required to use its own independent judgment to determine fair value; and (3) the district court did not abuse its discretion in calculating the fair value of dissenter shareholder's shares.

Affirmed.

Holland & Hart LLP and *Jeremy J. Nork* and *Ethan J. Birnberg*, Reno, for Appellants.

McDonald Carano Wilson LLP and *Craig A. Newby* and *William A.S. Magrath II*, Las Vegas, for Respondent.

1. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   In determining fair value of corporate stock under the dissenters' rights statutes, a district court may rely on proof of value by any technique that is generally accepted in the relevant financial community and should consider all relevant factors, provided the value must be fair and equitable to all parties, which approach allows the district court to adapt the meaning of fair value to the specific facts of the case. NRS 92A.380, 92A.490; NRS 92A.320 (2008).
2. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   In a statutory appraisal proceeding under the dissenters' rights statutes, both sides have the burden of proving their respective valuation positions by a preponderance of evidence. NRS 92A.380, 92A.490; NRS 92A.320 (2008).
3. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   Even if one side fails to satisfy its burden, in a statutory appraisal proceeding under the dissenters' rights statutes, a district court is not free to accept the competing valuation by default but must use its own independent judgment to determine fair value. NRS 92A.380, 92A.490; NRS 92A.320 (2008).
4. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   In a stockholder's right-to-dissent appraisal action, both the dissenting stockholder and the corporation have the burden of proving their respective valuation conclusions by a preponderance of the evidence in the district court; final responsibility for determining fair value, however, lies with the court, which must make its own independent value determination. NRS 92A.380, 92A.490; NRS 92A.320 (2008).
5. APPEAL AND ERROR.
   A district court's determination of fair value under an appraisal statute is reviewed under an abuse of discretion standard. NRS 92A.490.
6. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   Book value is entitled to little, if any, weight in determining the value of corporate stock under the dissenters' rights statutes, and many other factors must be taken into consideration. NRS 92A.380, 92A.490; NRS 92A.320 (2008).
7. CORPORATIONS AND BUSINESS ORGANIZATIONS.
   Where a controlling stockholder has provided limited evidence in a statutory appraisal proceeding, either pre-merger or during the trial, to en-

able a district court to perform its mandated task, the court may rely upon its expertise and upon whatever evidence is presented to determine fair value independently. NRS 92A.380, 92A.490; NRS 92A.320 (2008).

8. CORPORATIONS AND BUSINESS ORGANIZATIONS.

The district court did not abuse its discretion, in appraisal action brought by preferred stock shareholder dissenting to a merger, in calculating the fair value of dissenter's shares; the court considered several factors, including the price dissenting shareholder paid for its shares one year before the merger and the price that the acquired and surviving corporations indicated on a Securities and Exchange Commission document as the offering price of the preferred stock on the merger date. NRS 92A.380, 92A.490; NRS 92A.320 (2008).

Before CHERRY, GIBBONS and PICKERING, JJ.

OPINION

By the Court, CHERRY, J.:

In this appeal, we examine the definition of ''fair value'' as prescribed by the stockholder right-to-dissent statutes. We adopt a flexible approach in determining fair value, whereby the district court should evaluate a number of relevant factors in determining fair value.

Furthermore, we determine who bears the burden of proving the fair value of a stockholder's corporate shares in a stockholder's right-to-dissent appraisal action. We conclude that in such an appraisal proceeding, both the dissenting stockholder and the corporation have the burden of proving their respective valuation conclusions by a preponderance of the evidence. In evaluating the fair value, even if neither party satisfies its burden, the district court ultimately must use its independent judgment to determine the fair value.

FACTS

In 2006, respondent Cordillera Fund, L.P., purchased a total of 583,334 shares of series B convertible preferred stock in appellant American Ethanol, Inc., for $1,750,002, or $3 per share.[1] In July 2007, American Ethanol and appellant AE Biofuels, Inc., formalized a merger agreement, and American Ethanol notified its stockholders of their NRS Chapter 92A right to dissent. In response, Cordillera gave American Ethanol notice of its intent to dissent and demand payment for its total shares. The other American Ethanol

[1]Cordillera Fund originally purchased 250,000 shares of American Ethanol convertible preferred stock for $1,750,002 in September 2006. In February 2007, American Ethanol reduced the offering price to $3 per share and correspondingly issued to Cordillera an additional 333,334 shares. Thus, in total, Cordillera owned 583,334 shares of American Ethanol series B preferred stock at $3 per share.

stockholders approved the merger, and on December 7, 2007, the articles of merger were filed with the Nevada Secretary of State.

The following month, Cordillera sent appellants a demand for payment pursuant to NRS 92A.440. After appellants refused to tender payment, citing untimeliness, among other things, Cordillera filed a complaint for declaratory and injunctive relief in the district court. *See* NRS 92A.460. Specifically, Cordillera requested a declaration of its right to payment for its shares in American Ethanol, an injunction compelling appellants to comply with Nevada's dissenters' rights statutes, and reasonable attorney fees and costs. Appellants contested the timeliness of Cordillera's demand, and apparently, a secondary issue was also raised—the proper valuation of the shares.[2] The timeliness issue was heard first, and after a one-day trial, the jury found that Cordillera exercised its dissenter's right in a timely matter. Thus, the only remaining issue for the district court to determine was the fair value of Cordillera's shares of stock as of December 7, 2007, the date of the merger. *See generally* NRS 92A.490.

Neither Cordillera nor appellants provided an appraisal of the shares' fair value, and the district court directed appellants to either deliver payment or an offer for the ''fair market value'' of the shares plus accrued interest.[3] *See* NRS 92A.460; NRS 92A.470. The district court ordered that if the payment or the offer was not accepted by Cordillera, then Cordillera must notify appellants of its estimate of the shares' fair value no later than 30 days after compliance by appellants. *See* NRS 92A.480. The district court provided that if there remained a dispute between the parties concerning the fair value of shares, then the court would determine that value.

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[2]As the issue was not raised, we express no comment on the propriety of conducting an NRS 92A.440 proceeding in conjunction with an NRS 92A.490 proceeding.

[3]Although an appraisal would have been advantageous, neither party had an obligation to provide an appraisal pursuant to NRS 92A.490(1). In addition, while it might have been effective for the district court to appoint an appraiser pursuant to NRS 92A.490(4), it was under no obligation to do so. During oral argument, appellants' counsel stated that appraising Cordillera's shares of stock would be an extraordinarily difficult endeavor because: (1) Cordillera owned preferred stock, not common stock; (2) American Ethanol stock was not trading on a stock exchange; and (3) Cordillera owned very few shares of stock in relation to the total amount of the outstanding stock. Appellant's counsel maintains that an appraiser was obtained by appellants, but that the appraiser could not provide an appraisal.

Also, NRS Chapter 92A's dissenters' payment is for the fair value of the shares; the district court misapplied the term ''fair market value.'' ''Fair market value'' and ''fair value'' are two separate concepts. *See* 18A Am. Jur. 2d *Corporations* § 706 (2004) (fair value does not necessarily equate to market value); 18 C.J.S *Corporations* § 395 (2007) (market value is only one factor in determining value of shares).

Thereafter, appellants offered Cordillera $0.15 per share. Cordillera rejected the offer. Subsequently, Cordillera gave notice to appellants of its estimate of the fair value of the stock at $3 per share. The parties proceeded to trial because no agreement as to fair value could be reached.

At trial, Cordillera produced three Securities and Exchange Commission (SEC) documents to support its contention that the fair value of the stock on the merger date was $3 per share, including one that indicated that $3 per share was the offering price of the series B preferred stock as of the date of merger. Appellants provided testimony that the book value per share was representative of the fair value and thus, $0.15 per share was the appropriate payment owed.[4]

At the conclusion of the trial, the district court found that the preponderance of the evidence demonstrated that the offering price of American Ethanol stock was the most reliable showing of value, even though the offering price is not always or necessarily equivalent to the value of the stock. Moreover, the district court dismissed appellants' theory that the book value was representative of fair value in this case. Subsequently, the district court entered a judgment in favor of Cordillera and against appellants, jointly and severally, determining that a preponderance of the evidence established that the fair value of Cordillera's shares of stock at the time of the corporate merger was $1,750,002, or $3 per share. The total judgment was for $1,918,901.17, which represented the principal sum of $1,750,002, plus prejudgment interest of $168,899.17. Appellants appealed.

On appeal, appellants contend that the district court abused its discretion in determining the fair value of the shares because Cordillera failed to meet its burden of proof.

DISCUSSION

NRS 92A.300-.500 governs the rights of stockholders who dissent from certain corporate actions, such as mergers. *Cohen v. Mirage Resorts, Inc.*, 119 Nev. 1, 10, 62 P.3d 720, 726 (2003). These statutes were ''patterned after, or are identical to, the provisions of the 1984 Model Business Corporation Act.'' *Id.* ''The Model Act and Nevada's statutes are designed to facilitate business mergers, while protecting minority shareholders from being unfairly impacted by the majority shareholders' decision to approve a merger.'' *Id.* at 10, 62 P.3d at 726-27. Thus, minority stock-

[4]''Generally speaking book value of stock represents the difference between the assets and liabilities of a corporation—that is the value of the net assets.'' *Chadwick v. Cross, Abbott Company*, 205 A.2d 416, 419 (Vt. 1964); *see* J.H. Crabb, Annotation, *Meaning of ''Book Value'' of Corporate Stock*, 51 A.L.R.2d 606 (1957).

holders who dissent from a corporate action such as a merger are entitled to receive payment for the fair value of their shares. NRS 92A.380(1)(a).

Fair value

''Fair value'' is not explicitly defined in the statutes. The relevant version of NRS 92A.320 states merely that fair value is ''the value of the shares immediately before the effectuation of the corporate action to which [the stockholder] objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable.'' NRS 92A.320 (2008);[5] *see* 3 Model Bus. Corp. Act Ann. § 13.01 (4th ed. 2008). Thus, as noted in the official comment to the 1984 Model Business Corporation Act, the statute leaves it to the courts to work out ''the details by which 'fair value' is to be determined within the broad outlines of the definition.'' 3 Model Bus. Corp. Act Ann. § 13.01 cmt. 3 (3d ed. 1984).

Determining fair value, ''in actual practice . . . is not easy.'' *Steiner Corp. v. Benninghoff*, 5 F. Supp. 2d 1117, 1123 (D. Nev. 1998) (applying Nevada law). ''One of the first questions that must be addressed in any valuation study is what 'standard of value' the valuation study is meant to determine.'' *Id.* In Nevada, ''that standard is set by statute—the Nevada dissenters' rights statutes direct that dissenting shareholders should receive the 'fair value' of their shares.'' *Id.*; *see* NRS 92A.320; NRS 92A.380. ''Unfortunately, the statutes do not elaborate on what 'fair value' means, or on what should be considered in order to arrive at fair value.'' *Steiner*, 5 F. Supp. 2d at 1123. Lacking explicit statutory directive, courts typically consider ''all relevant factors'' when valuing dissenting stockholders' shares. Ferdinand S. Tinio, Annotation, *Valuation of Stock of Dissenting Stockholders in Case of Consolidation or Merger of Corporation, Sale of Its Assets, or the Like*, 48 A.L.R.3d 430 § 3(a) (1973).

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[5]We rely on the 2008 version of NRS 92A.320, as it was in effect during the pendency of the litigation.

In 2009, the Legislature amended NRS 92A.320. 2009 Nev. Stat., ch. 361, § 64, at 1720-21. However, the amended statute does not provide much additional guidance in determining fair value. NRS 92A.320 now provides:

> ''Fair value,'' with respect to a dissenter's shares, means the value of the shares determined:
>
> 1. Immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action unless exclusion would be inequitable;
>
> 2. Using customary and current valuation concepts and techniques generally employed for similar businesses in the context of the transaction requiring appraisal; and
>
> 3. Without discounting for lack of marketability or minority status.

In the related context of determining ''fair cash value'' under former NRS 78.510, this court has adopted a flexible approach that looks to a number of different factors. *See Southdown, Inc. v. McGinnis*, 89 Nev. 184, 188-90, 510 P.2d 636, 639-40 (1973) (noting that ''[t]he words 'fair cash value' . . . have been construed by courts elsewhere to mean the intrinsic value of the dissenting shareholder's interests determined from the assets and liabilities of the corporation considered in the light of every factor bearing on value''), *superseded by statute on other grounds as stated in United Ins. Co. v. Chapman Indus.*, 120 Nev. 745, 747-48, 100 P.3d 664, 666 (2004); *see also Steiner*, 5 F. Supp. 2d at 1126 (''any . . . factor bearing on value'' would be considered in determining fair value).

[Headnote 1]

Like other Model Business Corporation Act states, we conclude that, in determining ''fair value, the trial court may rely on proof of value by any technique that is generally accepted in the relevant financial community and should consider all relevant factors, but the value must be fair and equitable to all parties.'' *Advanced Communication Design v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000); *see also Torres v. Schripps, Inc.*, 776 A.2d 915, 923-24 (N.J. Super. Ct. App. Div. 2001); 18 C.J.S. *Corporations* § 394 (2011). This flexible approach ''allows the trial court to adapt the meaning of fair value to the specific facts of the case.'' *Pueblo Bancorporation v. Lindoe, Inc.*, 63 P.3d 353, 360 (Colo. 2003).

Burden of proof

Despite Nevada's flexible approach, appellants contend that Cordillera did not satisfy its burden of proof in establishing the fair value of its stock. Appellants' argument, however, presumes that in an appraisal matter, the burden is Cordillera's alone, a presumption not supported by the statutory language or existing Nevada caselaw.

The question of which party bears the burden of establishing the fair value of a corporation's stock at the time of merger is not expressly answered by Nevada's dissenters' rights statutes. NRS 92A.300-.500. And the question is one of first impression for this court. Other jurisdictions have, without much discussion, variously placed the burden on the corporation, the dissenting stockholder, or neither. *Matter of Cohen*, 636 N.Y.S.2d 994, 996 (Sup. Ct. 1995) (citing cases from the Eleventh Circuit Court of Appeals, Georgia, Delaware, Oregon, and Ohio).

Delaware corporate laws, like Nevada's, require the court to make the determination of fair value. *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 221 (Del. 2005). Instead of assigning the burden exclusively to one side or adopting the ''no burden'' approach taken in New York, *Matter of Cohen*, 636

N.Y.S.2d at 996, the Delaware Supreme Court has concluded that ''[i]n a statutory appraisal proceeding, both sides have the burden of proving their respective valuation positions by a preponderance of evidence.'' *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 520 (Del. 1999); *see In re Appraisal of Metromedia Intern. Group*, 971 A.2d 893, 899 (Del. Ch. 2009); *Highfields Capital, Ltd. v. AXA Financial*, 939 A.2d 34, 42 (Del. Ch. 2007); *Montgomery Cellular Holding*, 880 A.2d at 221. However, ''[e]ven if one side fails to satisfy its burden, the Court is not free to accept the competing valuation by default, but must use its own independent judgment to determine fair value.'' *Montgomery Cellular Holding*, 880 A.2d at 221; *see Highfields Capital*, 939 A.2d at 42-43 (if neither party adduces evidence sufficient to satisfy this burden, ''the court must then use its own independent judgment to determine fair value'' (internal quotations omitted)); *Metromedia*, 971 A.2d at 900 (''[A]fter having considered the parties' legal arguments and the respective experts' reports and testimony supporting their valuation conclusions, the Court has broad discretion either to select one of the parties' valuation models or to fashion its own.''); *see also Gonsalves v. Straight Arrow Publishers*, 701 A.2d 357, 361 (Del. 1997) (noting that it is the district court's responsibility to ''independently determine the value of the shares that are the subject of the appraisal action''); *see generally Chrome Data Systems, Inc. v. Stringer*, 820 P.2d 831, 833 n.2 (Or. Ct. App. 1991) (noting that, in Oregon, which has a relevant statute similar to Nevada's, the dissenting stockholders do not necessarily bear the burden of proof and suggesting that, even if no evidence is offered, dissenting stockholders are entitled to fair value).

[Headnotes 2-4]

The Delaware approach accords with notions of judicial economy and fairness, because it places on the parties the affirmative duty to prove their respective valuations but recognizes that, in the end, the court remains the final arbiter of fair value. As in Delaware, Nevada law makes the court the final arbiter of fair value. *See* NRS 92A.490(1) (the ''corporation shall . . . petition the court to determine the fair value''); NRS 92A.490(5)(a) (''dissenter . . . is entitled to a judgment [f]or the amount, if any, by which the court finds the fair value of the dissenter's shares''). Accordingly, we adopt Delaware's approach in determining fair value of a dissenting stockholder's shares of stock. As such, in a stockholder's right-to-dissent appraisal action, both the dissenting stockholder and the corporation have the burden of proving their respective valuation conclusions by a preponderance of the evidence in the district court. Final responsibility for determining fair

value, however, lies with the court, which must make its own independent value determination.

The district court's fair value determination

[Headnote 5]

An appellate court reviews a district court's determination of fair value under an appraisal statute such as NRS 92A.490 under an abuse of discretion standard. *See Gonsalves*, 701 A.2d at 360; *see also In re 75,629 Shares of Common Stock*, 725 A.2d 927, 931 (Vt. 1999); *Dodd v. Potomac Riverside Farm, Inc.*, 664 S.E.2d 184, 190 (W. Va. 2008).

[Headnotes 6, 7]

Appellants argue that the district court abused its discretion here by not deciding fair value based on the four factors discussed in *Steiner Corp. v. Benninghoff*, 5 F. Supp. 2d 1117, 1123 (D. Nev. 1998). But in *Steiner*, the court indicated that it already decided, in a prior, unreported decision, that '' 'fair value' would be determined by considering (1) the pre-merger market value of the shares, discounted for illiquidity, (2) the pre-merger enterprise value of the corporation as a whole, (3) the pre-merger net asset value of the corporation, and (4) any other factor bearing on value. Each measure of value will then be assigned a certain weight, and then averaged appropriately.'' *Id.* (quotations omitted).[6] Here, the district court was not provided the evidence necessary to calculate and apply the *Steiner* factors reliably.[7] ''Where, as here, a controlling stockholder has provided [limited] evidence, either pre-merger or during the trial, to enable the Court of Chancery to perform its mandated task, the Court may rely upon its expertise and upon whatever evidence is presented to determine fair value independently.'' *Montgomery Cellular Holding*, 880 A.2d at 222. This left the district court ''free to use whatever methodology was supportable by the record to reach a valuation result,'' *id.*, whether by adhering to one of the parties' properly supported valuations or by fashioning its own. *See In re Appraisal of Metromedia Intern. Group*, 971 A.2d 893, 900 (Del. Ch. 2009) (''[A]fter having con-

[6]Of note, the first *Steiner* factor discounts for lack of liquidity, which is contrary to the 2009 revisions of NRS 92A.320 providing that no marketability discount should be taken.

[7]Instead of presenting evidence supporting the factors listed in *Steiner*, appellants presented testimony as to the book value of the shares. The district court did not abuse its discretion in rejecting that testimony alone as probative of the fair value. ''Book value is entitled to little, if any, weight in determining the value of corporate stock, and many other factors must be taken into consideration.'' *Bendalin v. Delgado*, 406 S.W.2d 897, 900-01 (Tex. 1966); *see* 18A Am. Jur. 2d *Corporations* § 374 (2004).

sidered the parties' legal arguments and the respective experts' reports and testimony supporting their valuation conclusions, the Court has broad discretion either to select one of the parties' valuation models or to fashion its own.'').

[Headnote 8]

In light of the flexible standard of determining fair value, under which the district court is to consider all relevant factors presented by each of the parties and any independent examiner, and considering the evidence presented by Cordillera and appellants, we conclude that appellants have not demonstrated that the district court abused its discretion in calculating the fair value of Cordillera's shares. The district court considered several factors reflecting value, including the price that Cordillera paid for the shares of stock in 2006 and the price that appellants indicated on an SEC document as the offering price of the series B preferred stock on the merger date, all of which were $3 per share. While neither party provided extensive calculations as to the shares' fair value, the district court did not abuse its discretion in determining the fair value of Cordillera's shares based on the evidence before it. As such, we affirm the district court's judgment.

GIBBONS and PICKERING, JJ., concur.

MILDRED POWELL, APPELLANT, *v.* LIBERTY MUTUAL FIRE INSURANCE COMPANY, RESPONDENT.

No. 55159

May 5, 2011 252 P.3d 668

Appeal from a district court summary judgment in an insurance action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Insured filed suit against homeowner's insurer, after insurer denied her claim to cover damage to her house allegedly caused by ruptured water pipe, alleging claims for breach of contract, breach of duty of good faith and fair dealing, and breach of the Unfair Claims Settlement Practices Act. The district court granted summary judgment to insurer. Insured appealed. The supreme court, GIBBONS, J., held that earth movement exclusion in homeowner's insurance policy was ambiguous and, thus, was to be construed against insurer.

Reversed and remanded.

[Rehearing denied July 1, 2011]

[En banc reconsideration denied September 20, 2011]

Matthew L. Sharp, Reno, for Appellant.

Koeller Nebeker Carlson & Haluck, LLP, and *Megan K. Dorsey* and *Ian P. Gillan*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   In the interests of justice, the supreme court would address, on homeowner's appeal of summary judgment in favor of homeowner's insurer, issue of whether the district court was correct in dismissing homeowner's claim against insurer for breach of the Unfair Claims Settlement Practices Act in connection with insurer's denial of homeowner's claim under her policy, though homeowner failed to present in her opening brief any argument on her claim under the Act, as court ultimately concluded that there were genuine fact issues precluding summary judgment on homeowner's breach of contract claim against insurer, and it appeared that the district court based its dismissal of homeowner's claim under the Act on the summary judgment in favor of insurer on the breach of contract claim instead of considering the claim under the Act independently. NRS 686A.310.
2. APPEAL AND ERROR.
   Issues not raised in an appellant's opening brief are deemed waived. NRAP 28(a)(8).
3. APPEAL AND ERROR.
   It is the supreme court's prerogative to consider issues a party raises in its reply brief, and the court will address those issues if consideration of them is in the interests of justice.
4. APPEAL AND ERROR.
   The interpretation of an insurance policy presents a legal question, which the supreme court reviews de novo.
5. APPEAL AND ERROR.
   The supreme court reviews summary judgment de novo.
6. JUDGMENT.
   A district court may grant summary judgment if the evidence does not create a genuine issue of material fact.
7. JUDGMENT.
   When considering a motion for summary judgment, the district court must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party.
8. INSURANCE.
   If a provision in an insurance contract is unambiguous, a court will interpret and enforce it according to the plain and ordinary meaning of its terms.
9. INSURANCE.
   The question of whether an insurance policy is ambiguous turns on whether it creates reasonable expectations of coverage as drafted.
10. INSURANCE.
    Because the insurer is the one to draft the policy, an ambiguity in that policy will be interpreted against the insurer.
11. INSURANCE.
    While clauses in an insurance policy providing coverage are interpreted broadly so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insurer.

12. INSURANCE.
Ultimately, a court should interpret an insurance policy to effectuate the reasonable expectations of the insured.

13. INSURANCE.
Earth movement exclusion in homeowner's insurance policy listing mine subsidence and earth sinking, rising, and shifting as examples of earth movement, was ambiguous as to what earth movement was when it was not a type of widespread calamitous event, and, thus, exclusion was to be construed against insurer; earth movement exclusions typically only list naturally occurring events in their definitions of what constitutes earth movement, even though earth movement could also be caused by unnatural events, insurer's exclusion was even less clear than most earth movement exclusions, in that not all examples listed were naturally occurring events, and policy's ''settling clause'' seemed to support interpretation that earth movement exclusion only applied to naturally occurring events, instead of clarifying that it applied to both naturally occurring events and man-made events.

14. INSURANCE.
Because ambiguities in insurance policies must be interpreted against the insurer, if an insurer wishes to exclude coverage by virtue of an exclusion in its policy, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation excluding covering under the exclusion is the only interpretation of the exclusion that could fairly be made, and (3) establish that the exclusion clearly applies to the particular case.

Before CHERRY, GIBBONS and PICKERING, JJ.

OPINION

By the Court, GIBBONS, J.:

Appellant Mildred Powell filed an insurance claim with respondent Liberty Mutual Fire Insurance Company to cover damage to her house. Liberty Mutual denied the claim, stating that the damage was excluded under the earth movement exclusion in Powell's insurance policy. Powell then filed a complaint against Liberty Mutual in the district court. The district court eventually granted Liberty Mutual's motion for partial summary judgment, concluding that the earth movement exclusion of the Liberty Mutual policy excluded coverage of the damage.

We must determine whether the earth movement exclusion in Powell's insurance policy with Liberty Mutual is enforceable to exclude coverage of the damage to Powell's house and whether the district court erred in granting summary judgment in favor of Liberty Mutual. First, because the earth movement exclusion is ambiguous, we must construe it against Liberty Mutual. Second, we consider whether *Schroeder v. State Farm Fire and Casualty Co.*, 770 F. Supp. 558 (D. Nev. 1991), which held that an earth move-

ment exclusion barred recovery for similar damages to those sustained here, was applicable to the present case. We conclude that because the policy in *Schroeder* is distinguishable from the policy here, *Schroeder*'s holding is inapplicable. Thus, we hold that Liberty Mutual's earth movement exclusion is ambiguous and must be enforced against it, that the district court erred in granting summary judgment, and that *Schroeder*'s holding is case specific. Accordingly, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

Powell owns a house in Northwest Reno and has a homeowner's insurance policy through Liberty Mutual. The policy has an earth movement exclusion, which states in pertinent part:

> We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.[1] . . . **Earth movement**, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide, mine subsidence; mudflow; earth sinking, rising or shifting.

The policy also has a settling clause, which further excludes losses caused by ''[s]ettling, shrinking, bulging or expansion, including resultant cracking, of pavements, patios, foundations, walls, floors, roofs or ceilings.''

In July 2005, a water pipe in Powell's house exploded, flooding the dirt sub-basement. Powell made a claim to Liberty Mutual because her house had suffered a shift in the foundation and had suffered extensive cracking and separation in the wall and ceiling in the area of the entryway, kitchen, and two bedrooms. She attributed this damage to the burst water pipe.

An expert chosen by Powell and hired by Liberty Mutual inspected the house and concluded that ''after many years of relative foundation stability, [the house] is currently being affected by the expansion of supporting clay soils. This expansion, while likely present in lesser degrees in the past, has been severely aggravated by the intrusion of a significant amount of water a short time ago . . . .'' Liberty Mutual denied Powell's claim, citing the earth movement exclusion in her policy. Powell asked Liberty Mutual to reconsider the claim, and it denied that request. Then, Powell hired two professors of civil engineering at the University of

[1]This lead-in clause is commonly referred to as an anti-concurrent clause, which is meant to exclude damage caused by an excluded peril even when covered perils also contributed to the damage. *See Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 368 (S.D.N.Y. 2007).

Nevada, Reno, to inspect the house, and these professors concluded that there was ''no evidence of earth movement, subsidence, mudflow, earth sinking[,] rising or shifting,'' concluding that ''the structural cracking in the house was caused by swelling of foundation clay facilitated by the access to water resulting from the water damage.'' Powell requested Liberty Mutual to reconsider her claim again, and Liberty Mutual denied the request.

After her requests for reconsideration were denied, Powell filed suit against Liberty Mutual in the Second Judicial District Court of Nevada, alleging breach of contract, breach of the duty of good faith and fair dealing, and breach of the Nevada Unfair Claims Settlement Practices Act.[2] Liberty Mutual filed a motion for partial summary judgment on the breach-of-contract and breach-of-the-duty-of-good-faith-and-fair-dealing claims. The district court granted the motion on the bad faith claim in part, but denied it on the breach of contract claim, finding that there were genuine issues of material fact as to what caused the damage to Powell's house.

Subsequently, both Liberty Mutual and Powell hired their own experts to inspect the house in preparation for trial, and both experts prepared reports. Liberty Mutual's expert opined that while the plumbing leak ''may have contributed to the foundation settlement and associated distress to the residence[,] water from other sources, such as landscape irrigation, ponding adjacent to the foundation of the residence, and rainfall and snowfall, also contributed to the infiltration of moisture into the soil underlying the foundations of the residence.'' The expert thus concluded that ''the magnitude of water infiltration and extent of resultant damage from the reported leak could not be evaluated.'' Powell's expert concluded that while some ''lesser foundation movement'' may have occurred throughout the life of the house, it was the ''sudden wetting of the foundation soils from the water line rupture that resulted in the high level of damage now present.''

[Headnote 1]

Based on these expert's conclusions that the earth below Powell's house moved and was either the direct or indirect cause of the damage, Liberty Mutual submitted its renewed motion for partial summary judgment on the breach of contract claim. The district court, relying on *Schroeder*, granted this motion after finding that the policy explicitly excluded coverage for any damage caused directly or indirectly by soil movement. The district court then dis-

[2]Nevada's Unfair Claims Settlement Practices Act has been preempted as it applies to employee benefit plans only. *Brandner v. UNUM Life Ins. Co. of America*, 152 F. Supp. 2d 1219, 1228 (D. Nev. 2001); *Medford v. Metropolitan Life Ins. Co.*, 244 F. Supp. 2d 1120, 1126 (D. Nev. 2003).

missed the remaining claim of breach of the Nevada Unfair Claims Settlement Practices Act based on the two summary judgment orders. Powell appealed.

DISCUSSION

[Headnotes 2, 3]

In this case, the parties' arguments revolve around the breach of contract claim so we focus our opinion on that claim.[3] Powell argues that the district court erred in concluding that soil expansion caused by a water leak from a pipe fits within the scope of the earth movement exclusion, and that the conclusion in *Schroeder* should be applied and adopted here. We conclude that because the earth movement exclusion is ambiguous and must be construed against Liberty Mutual, soil expansion caused by a water leak from a pipe does not fall under the scope of the exclusion. Thus, the district court erred in granting Liberty Mutual summary judgment. We further conclude that *Schroeder* is case specific and distinguishable from the present case.

I. *Standard of review*

[Headnotes 4-7]

The interpretation of an insurance policy presents a legal question, which we review de novo. *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003). We review summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). A court may grant summary judgment if the evidence does not create a genuine issue of material fact. *Id.* When considering a motion for summary judgment, the court

[3]Powell also challenges the dismissal of her NRS 686A.310 claim. Powell failed to present any argument on her NRS 686A.310 claim in her opening brief. Issues not raised in an appellant's opening brief are deemed waived. *See Bongiovi v. Sullivan*, 122 Nev. 556, 570 n.5, 138 P.3d 433, 444 n.5 (2006); *see also* NRAP 28(a)(8). However, it is our prerogative to consider issues a party raises in its reply brief, and we will address those issues if consideration of them is in the interests of justice. *See Joyce v. Explosives Technologies Intern.*, 625 N.E.2d 446, 449 (Ill. App. Ct. 1993); *Paquin v. Mack*, 788 N.W.2d 899, 906 (Minn. 2010). Because we ultimately conclude that there are still genuine issues of material fact regarding Powell's breach of contract claim and it seems that the district court based its dismissal of her NRS 686A.310 claim off the summary judgment of the breach of contract claim instead of considering the facts under the NRS 686A.310 claim independently, we conclude that there are still issues of fact regarding her NRS 686A.310 claim. Thus, we reverse the dismissal of Powell's NRS 686A.310 claim.

Powell did not challenge the partial summary judgment on the breach-of-good-faith-and-fair-dealing claim. Thus, we only reverse the summary judgment of the breach of contract claim and the dismissal of the NRS 686A.310 claim.

must view the evidence and any reasonable inferences in the light most favorable to the nonmoving party. *Id.*

II. *Because the earth movement exclusion is ambiguous and must be interpreted against Liberty Mutual, the district court erred in granting Liberty Mutual summary judgment*

Powell contends that the district court erred by deciding that the earth movement exclusion applied here. We agree and conclude that not only is the earth movement exclusion ambiguous and must be interpreted against Liberty Mutual, but also, if Liberty Mutual had intended for the earth movement exclusion to exclude damage caused by soil movement from a ruptured pipe, then it would have had to clearly include that in the earth movement definition and show that the earth movement exclusion unmistakably applied to the damage here. Thus, the district court erred in granting Liberty Mutual summary judgment.

[Headnotes 8-12]

If a provision in an insurance contract is unambiguous, a court will interpret and enforce it according to the plain and ordinary meaning of its terms. *Neal*, 119 Nev. at 64, 64 P.3d at 473. ''The question of whether an insurance policy is ambiguous turns on whether it creates reasonable expectations of coverage as drafted.'' *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684, 99 P.3d 1153, 1157 (2004). Because the insurer is the one to draft the policy, an ambiguity in that policy will be interpreted against the insurer. *National Union Fire Ins. v. Reno's Exec. Air*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984). ''While clauses providing coverage are interpreted broadly so as to afford the greatest possible coverage to the insured, clauses excluding coverage are interpreted narrowly against the insurer.'' *Id.* Ultimately, a court should interpret an insurance policy to ''effectuate the reasonable expectations of the insured.'' *Id.*

A. *The earth movement exclusion is ambiguous*

[Headnote 13]

Earth movement exclusions were historically included in insurance policies to protect insurance companies from having to pay out on policies when a catastrophic event caused damage to numerous policyholders. *Peters Tp. School Dist. v. Hartford Acc. & Indem.*, 833 F.2d 32, 35-36 (3d Cir. 1987). Quoting *Wyatt v. Northwestern Mutual Insurance Co. of Seattle*, 304 F. Supp. 781, 783 (D. Minn. 1969), the *Peters* court noted that

> ''the reason for the insertion of the exclusionary clause . . . in all risk insurance policies is to relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against. There are earthquakes or

> floods which cause a major catastrophe and wreak damage to everyone in a large area rather than an individual policyholder. When such happens, the very basis upon which insurance companies operate is said to be destroyed. When damage is so widespread no longer can insurance companies spread the risk and offset a few or the average percentage of losses by many premiums.''

Id. at 35 (alteration in original).

In considering earth movement exclusions, other jurisdictions have concluded that there is often an ambiguity as to what type of damage earth movement exclusions apply because such exclusions typically only list naturally occurring events in their definitions of what constitutes earth movement, but earth movement can be caused by unnatural events as well. *See Sentinel Associates v. American Mfrs. Mut. Ins.*, 804 F. Supp. 815, 818 (E.D. Va. 1992); *Fayad v. Clarendon Nat. Ins. Co.*, 899 So. 2d 1082, 1088 (Fla. 2005); *Henning Nelson Const. Co. v. Fireman's Fund*, 383 N.W.2d 645, 653 (Minn. 1986); *United Nuclear Corp. v. Allendale Mut. Ins.*, 709 P.2d 649, 652 (N.M. 1985). Therefore, these courts interpret earth movement exclusions broadly and in favor of the insured party. *See, e.g.*, *Sentinel Associates*, 804 F. Supp. at 818. Using the rule of construction *ejusdem generis*[4] as a guiding principle, these courts have construed earth movement exclusions as referring only to naturally occurring events because the examples included in the definitions of earth movement are only natural events. *See, e.g.*, *id*.

The earth movement exclusion in Liberty Mutual's insurance policy lists mine subsidence,[5] and earth sinking, rising, and shifting as examples of earth movement. Because mine subsidence is caused by human intervention from previous years,[6] and a generalized reference to earth sinking, rising, and shifting without clarifying the cause for such sinking, rising, or shifting could include both natural and human-caused events, not all of the examples listed are naturally occurring events. Therefore, the earth movement exclusion in the Liberty Mutual policy is even less clear than most earth movement exclusions regarding what is excluded because earth movement exclusions have historically applied to natural catastrophic events, but the Liberty Mutual policy includes a

[4]*Ejusdem generis* is ''[a] canon of construction that when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.'' *Black's Law Dictionary* 535 (7th ed. 1999).

[5]''[M]ine subsidence is the lowering of strata overlying a . . . mine, including the land surface, caused by the extraction of underground [minerals].'' *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 474 (1987).

[6]*See Peters*, 833 F.2d at 36 (concluding that mine subsidence is a man-made event, not a naturally occurring event).

list of examples of mostly naturally occurring events as well as possibly human-caused events. Thus, the Liberty Mutual policy is ambiguous as to what precisely earth movement is when it is not a type of widespread, calamitous event.

Liberty Mutual argues that the settling clause would exempt coverage here. However, the district court based its decision on the earth movement exclusion, not the settling clause. Further, the ambiguity in the earth movement exclusion is not clarified by the language in the settling clause. Other jurisdictions have interpreted similar settling clauses that exclude damage caused by settling, shrinking, bulging, or expansion of soils as referring to gradual, natural processes that cause damage. *See Boston Co. Real Estate Counsel v. Home Ins. Co.*, 887 F. Supp. 369, 373 (D. Mass. 1995); *Winters v. Charter Oak Fire Ins. Co.*, 4 F. Supp. 2d 1288, 1295 (D.N.M. 1998); *Holy Angels Academy v. Hartford Ins. Group*, 487 N.Y.S.2d 1005, 1007 (Sup. Ct. 1985). Thus, in accordance with other jurisdictions' interpretation of similar settling clauses, the language of the settling clause in Powell's policy would seem to support an interpretation that the earth movement exclusion only applies to naturally occurring events, instead of clarifying that it applies to both naturally occurring events and man-made events. Yet, Liberty Mutual's earth movement exclusion lists both naturally occurring events and man-made events as examples. We conclude that not only is the earth movement exclusion ambiguous and must be interpreted against the insurer, Liberty Mutual, but the settling clause does not help clarify that ambiguity.

B. *If an insurance company wishes to deny coverage under an exclusion in the insurance policy, it must show that the exclusion clearly applies to the damage*

[Headnote 14]

Because ambiguities in insurance policies must be interpreted against the insurer, if an insurer wishes to exclude coverage by virtue of an exclusion in its policy, it must (1) write the exclusion in obvious and unambiguous language in the policy, (2) establish that the interpretation excluding covering under the exclusion is the only interpretation of the exclusion that could fairly be made, and (3) establish that the exclusion clearly applies to this particular case. *See Alamia v. Nationwide Mut. Fire Ins. Co.*, 495 F. Supp. 2d 362, 367 (S.D.N.Y. 2007). This is especially important in policies that include anti-concurrent clauses, such as the one included in Powell's policy, because anti-concurrent clauses are often broad and used to deny coverage in numerous different instances. While such clauses are valid, they require sufficient clarity as to what is specifically excluded from the policy. Because the anti-

concurrent clause in Powell's policy is not sufficiently clear, it does not clear up the ambiguity of the earth movement exclusion.

If Liberty Mutual had wished to exclude damage sustained as a result of soil movement from a burst pipe under its earth movement exclusion, it should have drafted a more explicit exclusion. Some insurance policies have clarified exactly what is excluded by their earth movement exclusion. These policies specify that earth movement can be due to either natural or unnatural causes. *See Alamia*, 495 F. Supp. 2d at 365; *Liebel v. Nationwide Ins. Co. of Florida*, 22 So. 3d 111, 113 (Fla. Dist. Ct. App. 2009). Some insurance policies have also specified that earth movement is not limited to a list of examples, and that no matter what causes the earth movement, if the earth moves, the damage is excluded. *See Chase v. State Farm Fire and Cas. Co.*, 780 A.2d 1123, 1126 (D.C. 2001); *Boteler v. State Farm Cas. Ins. Co.*, 876 So. 2d 1067, 1068-69 (Miss. Ct. App. 2004); *Alf v. State Farm Fire and Cas. Co.*, 850 P.2d 1272, 1273 (Utah 1993).

Because the Liberty Mutual policy does not include clear and unambiguous language, subject to only one interpretation, that clearly excludes the damage here, Liberty Mutual is unable to deny coverage of the claim if the district court determines that the claim stems from damage caused by soil movement as a direct result of the ruptured pipe. Thus, we conclude the district court erred in granting Liberty Mutual summary judgment.[7]

III. *The district court erred by relying on Schroeder v. State Farm Fire and Casualty Company*

Powell contends that the district court erred by relying on *Schroeder*, 770 F. Supp. 558, to support its conclusion that Liberty Mutual properly disclaimed coverage. We agree.

In *Schroeder*, a pipe ruptured, saturating the soil with water and causing the soil to settle, which ultimately damaged a building insured by a State Farm insurance policy. *Id.* at 559. The policyholder's claim was denied under the earth movement exclusion in the policy, which stated:

> We do not insure under any coverage for any loss which would not have occurred in the absence of one or more of the following excluded events. *We do not insure for such loss re-*

[7]Powell also argued in the alternative that even if the earth movement exclusion was unambiguous, there was a genuine issue of material fact concerning what the proximate cause of the damage was. As we conclude that the district court erred in granting Liberty Mutual summary judgment because the earth movement exclusion was ambiguous, we do not address Powell's alternative argument.

> *gardless of: (a) the cause of the excluded event; or (b) other causes of the loss; or (c) whether other causes acted concurrently or in any sequence with the excluded event to produce the loss:*
>
> b. earth movement, meaning the sinking, rising, shifting, expanding or contracting of earth, all whether combined with water or not. **Earth movement includes but is not limited to earthquake, landslide, erosion, and subsidence but does not include sinkhole collapse** . . . .

Id. at 560. *Schroeder* concluded that earth movement can include non-natural events, and that no matter what the cause, if earth movement is involved, coverage is denied. *Id*.

The district court granted Liberty Mutual summary judgment under the rationale that there was no reason to depart from the holding in *Schroeder*, especially because the facts were similar to those in *Schroeder*. However, the earth movement exclusion in *Schroeder* is distinguishable from the earth movement exclusion in Powell's policy. First, the policy in *Schroeder* was drafted differently than the policy here, and many courts have concluded that certain damage is excluded under earth movement exclusions in policies similar to the one in *Schroeder*. *See, e.g.*, *Chase*, 780 A.2d at 1126. *Schroeder*'s earth movement definition is not all-inclusive because it contains the language ''includes but is not limited to,'' whereas Liberty Mutual's policy simply states ''including.'' As such, the earth movement exclusion in *Schroeder* clearly applies to other events than those listed as examples in its earth movement definition and Liberty Mutual's does not. Second, *Schroeder*'s lead-in clause clearly states that it does not matter what caused the earth to move, if there is earth movement, the damage caused by that movement is excluded. When reading *Schroeder*'s lead-in clause and earth movement definition, one can discern what damage was excluded. Further, *Schroeder*'s earth movement definition includes earth movement combined with water, whereas Liberty Mutual's earth movement definition does not.

The conclusions reached by the court in *Schroeder* were based on the specific language of the policy at issue in that case. Simply because the damage to Powell's house might be excluded under the *Schroeder* policy does not mean it is excluded under the Liberty Mutual policy at issue in this case. Thus, we conclude the district court erred in relying on *Schroeder*.

CONCLUSION

In summary, we reverse the order of the district court concluding that (1) whether soil movement caused by a ruptured pipe is included in the scope of the earth movement exclusion is ambigu-

ous, thus the exclusion must be interpreted against Liberty Mutual; (2) the district court erred in granting Liberty Mutual summary judgment on the breach of contract claim; and (3) the district court erred in relying on *Schroeder* because it is factually distinguishable. As such, in the interests of justice, we also reverse the district court's dismissal of the Nevada Unfair Claims Settlement Practices Act claim as it was based on the summary judgment of the breach of contract claim. Accordingly, we reverse the judgment of the district court and remand this matter for proceedings consistent with this opinion.

CHERRY and PICKERING, JJ., concur.

VALLEY HEALTH SYSTEM, LLC, DBA CENTENNIAL HILLS HOSPITAL MEDICAL CENTER, A NEVADA LIMITED LIABILITY COMPANY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; THE HONORABLE JESSIE WALSH, DISTRICT JUDGE; AND THE HONORABLE JACK B. AMES, DISTRICT JUDGE, RESPONDENTS, AND ROXANNE CAGNINA, REAL PARTY IN INTEREST.

No. 56239

May 6, 2011 252 P.3d 676

Original petition for a writ of mandamus challenging a district court discovery order in a tort action.

Medical center filed petition for writ of mandamus, challenging adoption by district court of discovery commissioner's report and recommendation to compel disclosure of documents for which medical center claimed privilege. The supreme court, DOUGLAS, C.J., held that: (1) medical center failed to preserve for the supreme court's review claim of statutory privilege with respect to disclosure of documents that was not presented to discovery commissioner, and (2) documents and records not prepared by medical center's patient safety committee were not protected by statutory confidentiality.

Petition denied.

Hall Prangle & Schoonveld, LLC, and *David P. Ferrainolo, John F. Bemis*, and *Michael E. Prangle*, Las Vegas, for Petitioner.

The Law Offices of Neal Hyman and *Neal K. Hyman*, Henderson, for Real Party in Interest.

1. MANDAMUS.
   A writ of mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within the supreme court's discretion.
2. MANDAMUS.
   Because mandamus is an extraordinary remedy, a writ will not issue if the petitioner has a plain, speedy, and adequate remedy at law.
3. MANDAMUS.
   The burden is on the petitioner seeking mandamus relief to demonstrate that such extraordinary relief is warranted.
4. MANDAMUS.
   Although a writ of mandamus may be issued to compel the district court to vacate or modify a discovery order, extraordinary writs are generally not available to review discovery orders.
5. MANDAMUS.
   There are two main situations when the supreme court will issue a writ to prevent improper discovery: blanket discovery orders with no regard to relevance, and discovery orders compelling disclosure of privileged information.
6. MANDAMUS.
   As justification for the issuance of a writ of mandamus, if a discovery order requires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information, because once such information is disclosed, it is irretrievable.
7. APPEAL AND ERROR.
   Medical center failed to preserve for review claim of statutory privilege with respect to disclosure of documents that was not presented to discovery commissioner. NRS 439.875.
8. APPEAL AND ERROR.
   One purpose of the waiver rule is to allow the district court the first opportunity to decide the issue.
9. PRETRIAL PROCEDURE.
   All arguments, issues, and evidence relating to a discovery request should be presented at the first opportunity and not held in reserve to be raised after the discovery commissioner issues his or her recommendation.
10. PRETRIAL PROCEDURE.
    All objections to discovery requests are to be presented to the discovery commissioner so that he or she may consider all the issues before making a recommendation, so as not to frustrate the purpose of having discovery commissioners.
11. REFERENCE.
    Neither the supreme court nor the district court will consider new arguments raised in objection to a discovery commissioner's report and recommendation that could have been raised before the discovery commissioner but were not.
12. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
    Records and documents not prepared by medical center's patient safety committee were not protected by statutory privilege. NRS 439.875(5).

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, C.J.:

In this opinion, we review our rule regarding the waiver of an issue on appeal that is not first raised in the district court. We expand that rule to include the situation where a party fails to raise an issue before the discovery commissioner and, instead, raises the issue for the first time before the district court. Further, we determine the scope of the privilege provided by NRS 439.875.

This is an original petition for a writ of mandamus challenging a district court's order adopting the report and recommendation of the discovery commissioner to grant a motion to compel production of documents. The district court, after a hearing, adopted the discovery commissioner's report and recommendation and ordered petitioner Valley Health System, LLC, d.b.a. Centennial Hills Hospital Medical Center to produce the requested documents.

Valley Health argues that the district court erred in ordering the production of the requested documents. Valley Health contends that its petition for extraordinary relief should be granted because the district court's order allows for discovery of material privileged under NRS 439.875, and Valley Health has no other adequate remedy at law. However, Valley Health failed to raise its privilege argument before the discovery commissioner; instead, Valley Health raised the issue for the first time during the district court hearing.

While writ relief is rarely available with respect to discovery orders, once information is produced, any privilege applicable to that information cannot be restored. Thus, a writ petition is the proper mechanism to seek relief in this instance, and we will consider the petition. Based on the partial holding of this opinion, because Valley Health failed to raise its privilege argument before the discovery commissioner, that argument was waived. However, for the purpose of this opinion and, in this instance only, we elect to entertain Valley Health's privilege argument on its merits. We conclude that the requested discovery is not within the protection of NRS 439.875, and we therefore deny this petition.

PROCEDURAL HISTORY AND FACTS

In May 2008, real party in interest Roxanne Cagnina arrived at Centennial Hills Hospital for medical treatment after experiencing seizures. During Cagnina's stay at Centennial Hills, she was allegedly sexually assaulted by a member of the hospital staff, Steven Farmer.[1] Subsequent to the alleged assault, Cagnina com-

[1]Farmer was a certified nurse's assistant provided to Centennial Hills under a supplemental staffing contract by an outside vendor.

menced the underlying civil action against Valley Health and other defendants.

During discovery, Cagnina sought to have Valley Health produce records of other incidents or complaints of improper conduct by employees, staff, or others, if any.[2] Cagnina requested records not only from Centennial Hills, but also from other hospitals that were under Valley Health's management or control.[3] Valley Health objected to the request.[4] Cagnina filed a motion to compel a response. Valley Health opposed the motion, arguing that the requested discovery was irrelevant and was not reasonably calculated to lead to the discovery of admissible evidence. The motion was heard before a discovery commissioner. The discovery commissioner recommended that Cagnina's motion be granted in part and that Valley Health be ordered to produce documents responsive to the discovery request for the five years preceding the alleged sexual assault.

Valley Health filed an objection to the discovery commissioner's report and recommendation. *See* EDCR 2.34(f). Valley Health again argued that the requested documents were irrelevant to Cagnina's claims and, for the first time, contended that the requested information was privileged under NRS 439.875. The district court affirmed and adopted the discovery commissioner's report and recommendation.

Valley Health now seeks a writ of mandamus directing the district court to modify the discovery commissioner's report and recommendation to provide that Valley Health is not required to respond to the discovery request at issue.

DISCUSSION

Whether Valley Health made a showing that writ relief is warranted

[Headnotes 1-3]

A writ of mandamus is an extraordinary remedy, and whether a petition for extraordinary relief will be considered is solely within

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[2]Cagnina's discovery request states:

> Please produce any and all documents or records related to other incidents or complaints of assaults, batteries or sexual assaults or improper conduct by employees, nurses, nurses['] assistants, doctors, agents, administrators, staff or independent contractors at Centennial Hills Hospital Medical Center or other facility owned, operated or managed by Defendant.

[3]Besides doing business as Centennial Hills, Valley Health owns, operates, or manages four other hospitals in the Las Vegas area.

[4]Valley Health's objection states:

> OBJECTION. This Request as drafted is overbroad in that it seeks documents from ''Centennial Hills Hospital Medical Center or other facility owned, operated or managed by Defendant[.''] Information from other facilities owned by Defendant is irrelevant and production of said documents is not reasonably calculated to lead [to] the discovery of admissible information.

this court's discretion. *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). ''Because mandamus is an extraordinary remedy, a writ will not issue if the petitioner has a plain, speedy and adequate remedy at law.'' *Millen v. Dist. Ct.*, 122 Nev. 1245, 1250-51, 148 P.3d 694, 698 (2006). The burden is on the petitioner to demonstrate that extraordinary relief is warranted. *Pan v. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnotes 4, 5]

Although we have recognized that a writ of mandamus may be issued to compel the district court to vacate or modify a discovery order, extraordinary writs are generally not available to review discovery orders. *Wardleigh v. District Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183 (1995);[5] *Clark County Liquor v. Clark*, 102 Nev. 654, 659, 730 P.2d 443, 447 (1986); *Clark v. District Court*, 101 Nev. 58, 64, 692 P.2d 512, 516 (1985); *Schlatter v. District Court*, 93 Nev. 189, 193, 561 P.2d 1342, 1344 (1977). However, ''there are occasions where, in the absence of writ relief, the resulting prejudice would not only be irreparable, but of a magnitude that could require the imposition of such drastic remedies as dismissal with prejudice or other similar sanctions.'' *Wardleigh*, 111 Nev. at 351, 891 P.2d at 1184. In general, there have been two main situations where this court has issued a writ to prevent improper discovery: blanket discovery orders with no regard to relevance, and discovery orders compelling disclosure of privileged information. *See Clark County Liquor*, 102 Nev. at 659, 730 P.2d at 447.

[Headnote 6]

Here, Valley Health argues that issuance of a writ is warranted because production of the requested documents would lead to (1) a miscarriage of justice, (2) discovery of irrelevant materials, and (3) discovery of privileged materials. We conclude that the first two arguments offered by Valley Health are without merit.[6] However, in regard to the third argument, if the discovery order re-

[5]Although petitioner has moved for a writ of mandamus, we note that this court has stated that a writ of prohibition is a more appropriate remedy for the prevention of improper discovery. *See Wardleigh v. District Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995) (reaffirming *State ex rel. Tidvall v. District Court*, 91 Nev. 520, 524, 539 P.2d 456, 458 (1975)).

[6]Miscarriage of justice is defined as ''[a] grossly unfair outcome in a judicial proceeding.'' *Black's Law Dictionary* 1088 (9th ed. 2009). Here, Valley Health did not establish that the discovery order would create a grossly unfair outcome. Although Valley Health argues that requiring it to compile the documents would amount to a miscarriage of justice, the mere fact that a party is required to review a large amount of documents is not, without more, a basis of denying a party's right to conduct discovery in this instance.

Furthermore, we have long held that where the petitioner's claim is only that there is no right of discovery, a writ will not issue because a direct appeal

quires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information, because once such information is disclosed, it is irretrievable.[7] Therefore, we will consider Valley Health's contention that the requested documents fall within the statutory protection of NRS 439.875(5).

Failure to raise an issue presentable to the discovery commissioner constitutes waiver of the issue

[Headnotes 7, 8]

Initially, however, we must consider the fact that although Cagnina's motion to compel was first heard before the discovery commissioner, Valley Health did not raise its privilege argument until the discovery commissioner's report and recommendation was before the district court for approval. This court has held that ''[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'' *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981); *see also Wolff v. Wolff*, 112 Nev. 1355, 1363-64, 929 P.2d 916, 921 (1996). One purpose of this rule is to allow the lower tribunal the first opportunity to decide the issue. *See Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344-45, 905 P.2d 168, 173 (1995). We conclude that this principle is equally applicable where, as here, an issue is first heard by the discovery commissioner and then submitted to the district court for approval.

[Headnotes 9, 10]

Additionally, consideration of such untimely raised contentions ''would unduly undermine the authority of the Magistrate Judge by allowing litigants the option of waiting until a Report is issued to advance additional arguments.''[8] *Abu-Nassar v. Elders Futures, Inc.*, No. 88 Civ. 7906 (PKL), 1994 WL 445638, at *4 n.2 (S.D.N.Y. Aug. 17, 1994). A contrary holding would lead to the

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is an adequate remedy. *Clark County Liquor*, 102 Nev. at 660, 730 P.2d at 447. Therefore, a writ is not appropriate to address Valley Health's argument that the district court's order would lead to the discovery of irrelevant material.

[7]We note that Valley Health's challenge to the discovery order was not perfected pursuant to NRCP 26. Valley Health did not comply with NRCP 26(b)(5), which requires a party claiming privilege to describe the nature of the materials that are allegedly privileged. However, because the parties did not brief this issue, we do not address the effect it has on this writ petition.

[8]In the federal court system, the procedural interaction between a magistrate judge and a district court judge is similar to the interaction between the discovery commissioner and the district court in the instant matter, in that a magistrate judge may be designated to conduct hearings and to submit to a district court judge for approval proposed findings of fact and recommendations. *See U.S. v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000).

inefficient use of judicial resources and allow parties to make an end run around the discovery commissioner by making one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court. All arguments, issues, and evidence should be presented at the first opportunity and not held in reserve to be raised after the commissioner issues his or her recommendation. All objections are to be presented to the commissioner so that he or she may consider all the issues before making a recommendation, so as not to ''frustrate the purpose'' of having discovery commissioners. *See Greenhow v. Secretary of Health & Human Services*, 863 F.2d 633, 638 (9th Cir. 1988) (holding that ''allowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory'' in the district court would ''frustrate the purpose'' of having magistrates), *overruled on other grounds by U.S. v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).

[Headnote 11]

Therefore, we hold that neither this court nor the district court will consider new arguments raised in objection to a discovery commissioner's report and recommendation that could have been raised before the discovery commissioner but were not.

Based on the foregoing, Valley Health's argument against disclosure based on privilege would have been waived. However, for the purposes of this opinion, we elect to consider Valley Health's privilege argument on its merits.

Whether the requested documents fell within the statutory privilege protections of NRS 439.875(5)

[Headnote 12]

Although we conclude that Valley Health has waived its NRS 439.875 protection argument, writ relief would not be warranted even if the argument was not waived. NRS 439.875(5) provides that ''[t]he proceedings and records of a patient safety committee are subject to the same privilege and protection from discovery as the proceedings and records described in NRS 49.265.'' NRS 49.265(1) provides that ''proceedings and records'' of ''[o]rganized committees of hospitals'' responsible for the ''evaluation and improvement of the quality of care'' and peer review committees are not subject to discovery.[9]

While we have not previously addressed the scope of the privilege under NRS 439.875(5), given that NRS 439.875(5) explicitly references the privilege in NRS 49.265, we conclude that NRS 439.875(5)'s privilege has the same scope and application as NRS

[9]For the purpose of this discussion, ''organized committees of hospitals'' refer to the patient safety committee.

49.265. We addressed the scope of the privilege under NRS 49.265 in *Columbia/HCA Healthcare v. Dist. Ct.*, 113 Nev. 521, 936 P.2d 844 (1997). In that case, plaintiffs sought occurrence reports arising out of the medical malpractice at issue. *Id.* at 523-24, 936 P.2d at 845-46. Those occurrence reports were reports generated by hospital staff when unusual circumstances occurred during treatment of patients. *Id.* at 524 n.3, 936 P.2d at 846 n.3. The hospital argued that the reports were privileged under NRS 49.265. *Id.* at 524, 936 P.2d at 846. In resolving this issue, we held that the privilege under NRS 49.265 is extremely limited and does not protect occurrence reports from discovery. *Id.* at 531, 936 P.2d at 851. A narrow interpretation of NRS 49.265 was supported by legislative history. *Id.* at 529-31, 936 P.2d at 849-50. Under this narrow interpretation, the reports were not protected because they were not generated by the medical review committee or produced during its review process. *Id.* Such a result was additionally necessary, we held, because a hospital may attempt to immunize itself from discovery by submitting the records and documents to the committee if the privilege is construed to include records and documents not produced by the committee but only submitted to the committee, which is contrary to public policy. *See id.* at 529, 936 P.2d at 849 (citing *Lipschultz v. Superior Court, Etc.*, 623 P.2d 805, 808 (Ariz. 1981); *May v. Wood River Tp. Hosp.*, 629 N.E.2d 170, 174 (Ill. App. Ct. 1994)).

We find the rationale stated in *Columbia/HCA* to be equally applicable to NRS 439.875. Therefore, we hold that NRS 439.875(5)'s privilege only applies to protect internal documents and records of the patient safety committee from discovery. As Cagnina is not seeking documents and records of the patient safety committee, the information she seeks is not privileged.

Based on the foregoing, we deny the petition for a writ of mandamus.[10]

CHERRY, SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

[10]Although we conclude that the discovery Cagnina was seeking was not protected by NRS 439.875(5)'s privilege, we note that the parties should focus on discovery related to sexual misconduct. We note that the discovery request on its face was very broad; however, disputes as to the scope of discovery and to the discovery request are to be resolved pursuant to NRCP 26. Furthermore, although Cagnina originally raised this issue, she conceded at oral argument that the district court's discovery order and the discovery request were not intended to require Valley Health to interview all past and present employees or agents. Cagnina agreed that discovery was sought for past records of similar incidents, such as patient abuse, and that she was not seeking anything that was produced by the patient safety committee. Our holding is based on these representations.

DLYNN LANDRETH, APPELLANT, *v.*
AMIT MALIK, RESPONDENT.

No. 49732

May 12, 2011 251 P.3d 163

Petition for rehearing of *Landreth v. Malik*, 125 Nev. Adv. Op. No. 61, 221 P.3d 1265 (2009), an appeal from a district court default judgment. Eighth Judicial District Court, Family Court Division, Clark County; N. Anthony Del Vecchio, Judge.

Male former cohabitant filed action seeking half equity in real and personal property acquired during relationship with female. The district court entered default judgment and denied female's motion to set aside default judgment. Female appealed. On rehearing, the supreme court, HARDESTY, J., held that: (1) district court judge sitting in family court had subject matter jurisdiction to adjudicate dispute between unmarried former couple relating to distribution of real and personal property acquired while they lived together, (2) male cohabitant was required to provide female with renewed notice of intent to seek default judgment after he granted her numerous extensions of time to file answer, and (3) male cohabitant was required to determine female's intent to respond to male's complaint before filing for default judgment.

Prior opinion withdrawn; reversed.

DOUGLAS, C.J., with whom PICKERING, J., agreed, dissented. CHERRY, J., dissented.

Hansen Rasmussen, LLC, and *Jonathan J. Hansen*, Las Vegas, for Appellant.

Robert W. Lueck, Las Vegas, for Respondent.

Kathleen T. Breckenridge, Reno, for Amicus Curiae Family Law Section of Nevada State Bar.

Lemons, Grundy & Eisenberg and *Robert Eisenberg*, Reno, for Amicus Curiae Nevada District Court Judges' Association.

1. APPEAL AND ERROR; COURTS.
   Whether a court lacks subject matter jurisdiction can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties.
2. JUDGMENT.
   If the district court lacks subject matter jurisdiction, the judgment it renders is void.
3. COURTS.
   State constitutional provisions granting authority to Legislature to establish original and appellate jurisdiction of district courts and to establish

family courts were ambiguous in that they permitted two or more reasonable but inconsistent interpretations as to scope of family court's subject matter jurisdiction, and therefore, in interpreting authority of family court judge, supreme court would need to consider provision's history and statutes enacted under them. Const. art. 6, § 6.

4. CONSTITUTIONAL LAW.
   Constitutional interpretation utilizes the same rules and procedures as statutory interpretation: the court will apply the plain meaning of the provision unless it is ambiguous, meaning that it is susceptible to two or more reasonable but inconsistent interpretations.
5. CONSTITUTIONAL LAW.
   If a constitutional provision is ambiguous, the court will look to the history, public policy, and reason for the provision to discern its meaning.
6. CONSTITUTIONAL LAW.
   The interpretation of a constitutional provision will be harmonized with other statutes.
7. COURTS.
   A district court judge sitting in family court had subject matter jurisdiction, consistent with authority granted under state constitution, to adjudicate dispute between unmarried former couple relating to distribution of real and personal property acquired by couple while they lived together, regardless of whether nature of dispute was not included in statute that enumerated matters over which family court had exclusive and original jurisdiction. Const. art. 6, § 6; NRS 3.223.
8. COURTS.
   ''Subject matter jurisdiction'' is the court's authority to render a judgment in a particular category of case.
9. COURTS.
   ''Judicial power'' is the authority to hear and determine justiciable controversies, and also includes the power to make and enforce final decisions.
10. JUDGES.
    A district court judge sitting in another court does not lose his or her judicial power.
11. JUDGES.
    In Nevada, a judge sitting in the family division is a district court judge who retains his or her judicial powers derived from the Constitution to dispose of justiciable controversies. Const. art. 6, § 6.
12. JUDGMENT.
    Male former cohabitant was required to provide female with proper notice of intent to seek default judgment on his complaint for determination of his interest in real and personal property that was acquired by couple while they lived together, after he provided first notice of intent to seek default judgment and then granted female numerous extensions of time to file answer. RPC 3.5A.
13. JUDGMENT.
    Male former cohabitant was required to determine female's intent to respond to male's complaint for determination of his interest in real and personal property acquired by couple while they lived together before filing for default judgment. RPC 3.5A; NRCP 55(b)(2).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

On December 24, 2009, this court issued an opinion in this appeal vacating the district court's default judgment for respondent Amit Malik. Thereafter, Malik filed a petition for rehearing pursuant to NRAP 40. We granted rehearing on July 22, 2010, and we now withdraw our December 24, 2009, opinion, and issue this opinion in its place.

In this appeal we consider two issues. First, we consider whether the Legislature has the constitutional authority to limit the powers of a district court judge in the family court division of a judicial district. We conclude that it does not. Article 6, Section 6(1) of the Nevada Constitution grants original and appellate jurisdiction to the district courts in the judicial districts of the state. Article 6, Section 6(2) permits the Legislature to establish a family court as a division of any judicial district and to prescribe its jurisdiction. Pursuant to the Constitution's grant of this authority, the Legislature established a family court division in the Second and Eighth Judicial Districts and limited the family courts' jurisdiction to matters specifically enumerated in NRS 3.223. However, all judges in the family court division are district court judges with authority to preside over matters outside the family court division's jurisdiction.[1]

This appeal involves an unmarried, childless couple, who previously lived together and now dispute the ownership of certain property. Although NRS 3.223 does not give the family court division jurisdiction over such matters, the Legislature does not have the constitutional authority to limit the constitutional powers of a district court judge in the family court division. Therefore, we hold that the district court judge sitting in family court did not lack the power and authority to dispose of this case merely because it involved a subject matter outside the scope of NRS 3.223.

Second, we must determine whether the district court abused its discretion when it denied appellant Dlynn Landreth's motion to set aside the default without considering whether Malik gave a proper notice of intent to take a default. A party is required to inquire into the opposing party's intent to proceed before requesting a default under this court's holding in *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237 (1979), and Rule of Professional Conduct (RPC) 3.5A. Generally, one notice of an intent to request a default is sufficient

[1]In dissenting, CHIEF JUSTICE DOUGLAS, with whom JUSTICE PICKERING concurs, agrees with this proposition provided the family court judge is first reassigned to a division other than the family court.

for purposes of *Rowland* and RPC 3.5A. If, however, the party applying for a default grants subsequent time extensions, that party must also provide a subsequent notice of his or her intent to seek a default. Thus, we conclude that the district court abused its discretion when it denied Landreth's motion to set aside the default when Malik admitted to granting further time extensions without subsequently serving Landreth with another notice of intent to request a default.

FACTS

Landreth and Malik met in July 2001 and lived together in Arizona, Texas, and Florida from 2001 until 2004 when, according to Landreth, she decided to end the relationship and move to Las Vegas. The parties never married and did not have children together.

Landreth asserts that she acquired a residence after she arrived in Las Vegas using her own money for the down payment and to make upgrades and improvements to the home. Landreth acknowledges that the couple briefly reunited when Malik moved to Las Vegas, but maintains that in September 2005 the relationship ended.

According to Malik, however, the decision to move to Las Vegas was mutual, with Landreth moving first. Malik contends that the $80,000 down payment used to purchase the home originated from the couple's joint checking account and that the $50,000 used to renovate the home was also drawn from that account.

In September 2006, Malik filed an action in the Eighth Judicial District Court's Family Court Division seeking half of the equity in the real property, half of certain personal property acquired during the relationship, and all of his separate personal property. Landreth was served with the complaint on October 4, 2006. She hired counsel to represent her, but she contends that she had difficulty communicating with her counsel because she was living in the Caribbean at the time.

During October and November, Malik granted Landreth numerous extensions of time to file an answer. Although no default had been entered, on December 14, 2006, Malik served Landreth with a notice of intent to apply for a default judgment. Landreth maintains that notwithstanding the notice of intent to apply for a default judgment, Malik thereafter granted her additional extensions of time to answer the complaint. Landreth contends that a letter from her counsel to Malik's counsel documented yet another oral agreement to extend time beyond December 19, 2006. However, on February 27, 2007, Malik requested, and the clerk entered, a default. Landreth filed her answer and a counterclaim on

March 5, 2007. Malik served Landreth with a notice of default hearing on March 22, 2007. Subsequently, Landreth filed a motion to set aside the default. In the motion, Landreth asserted that Malik's counsel violated RPC 3.5A by failing to notify Landreth's counsel of his application for a default after Malik had granted Landreth more time to file her answer.

On May 18, 2007, the family court denied Landreth's motion to set aside the default, finding that Malik had offered Landreth numerous opportunities to answer, but that her delay warranted the entry of a default judgment. Thus, the court entered default judgment against Landreth. In upholding the entry of default, however, the district court failed to address Landreth's contention that Malik had granted her subsequent time extensions after giving her the notice of intent to take default.

In the default judgment, the family court judge concluded that the down payment was drawn from the couple's joint checking account. Therefore, the court found that Malik was co-owner of the Las Vegas home and was the owner or co-owner of other personal property located within the residence. Landreth appeals.

DISCUSSION

On appeal, Landreth claims for the first time that the family court lacked subject matter jurisdiction to hear Malik's case under Nevada Constitution Article 6, Section 6(2) because his case did not fit within those matters subject to the family court's jurisdiction under NRS 3.223. Specifically, Landreth argues that because the parties were not married, did not have children, and the litigation was limited to a dispute between two unmarried persons over the title and ownership of property, the family court lacked jurisdiction to hear the case. Malik counters that because the parties maintained a meretricious relationship, the family court properly exercised jurisdiction over the case pursuant to Eighth Judicial District Court Rule (EDCR) 5.02(a) and this court's precedent. We conclude that the family court judge did not lack the authority to resolve this case merely because it involved a subject matter outside NRS 3.223's scope.

[Headnotes 1, 2]

As an initial matter, whether a court lacks subject matter jurisdiction ''can be raised by the parties at any time, or sua sponte by a court of review, and cannot be conferred by the parties.'' *Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990). However, if the district court lacks subject matter jurisdiction, the judgment is rendered void. *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984). We therefore address Lan-

dreth's subject matter jurisdiction argument, which requires that we review Article 6, Section 6 of the Nevada Constitution and interpret NRS 3.223.

Article 6, Sections 6(1) and 6(2) are ambiguous

[Headnotes 3-6]

To resolve whether the district judge sitting in the family court lacked authority to adjudicate Malik's case requires that we interpret Article 6, Section 6 of the Nevada Constitution. Constitutional interpretation utilizes the same rules and procedures as statutory interpretation. *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). We will apply the plain meaning of a statute unless it is ambiguous, ''meaning that it is susceptible to 'two or more reasonable but inconsistent interpretations.' '' *Secretary of State v. Burk*, 124 Nev. 579, 590, 188 P.3d 1112, 1120 (2008) (quoting *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998)). If the constitutional provision is ambiguous, we look to the history, public policy, and reason for the provision. *Id*. Additionally, ''the interpretation of a . . . constitutional provision will be harmonized with other statutes.'' *We the People Nevada*, 124 Nev. at 881, 192 P.3d at 1171.

We conclude that Article 6, Section 6 is ambiguous because it is susceptible to two or more reasonable interpretations. Together, Sections 6(1) and 6(2) may be reasonably interpreted to grant the Legislature the authority to establish family courts and either: (1) as Landreth argues, allow the Legislature to set limits on the subject matter jurisdiction of the family court and thus restrain the power and authority of the judge sitting in the family court division; or (2) as Malik argues, grant judges sitting in the family court division the same constitutional power and authority as other district court judges, including the power to adjudicate cases outside of the matters listed in NRS 3.223. Because both interpretations are reasonable but inconsistent, we conclude that Article 6 is ambiguous. Accordingly, we turn to the constitutional provisions' history and harmonize it with statutes enacted under them.

Family court judges are district court judges sitting in the family court division

[Headnote 7]

We conclude that the Legislature has the constitutional authority to create a family court division of any district court and prescribe its jurisdiction; however, the Legislature does not have the constitutional authority to limit the constitutional powers of a district court judge sitting in the family court division. Therefore, we hold that the district court judge sitting in the family court division

did not lack the power and authority to dispose of this case merely because it involved a subject matter outside the scope of NRS 3.223.[2]

Senate Joint Resolution 24

Senate Joint Resolution (S.J. Res.) 24, proposing an amendment to the Nevada Constitution to authorize the establishment of a family court division of the district court, was introduced in the 1987 and 1989 legislative sessions and was ultimately approved and ratified by the voters. *See* S.J. Res. 24, 64th Leg. (Nev. 1987); 1987 Nev. Stat., file no. 131, at 2444; S.J. Res. 24, 65th Leg. (Nev. 1989); 1989 Nev. Stat., file no. 26, at 2222. Although the legislative history of S.J. Res. 24 suggests that the primary focus was on the need to establish a family court division, it appears that the Legislature intended that the judge of a family court would be a district court judge ''equal to all of the other district judges to hear just those domestic matters.'' Hearing on S.J. Res. 24 Before the Senate Judiciary Comm., 65th Leg. (Nev., Jan. 24, 1989) (quoting Senator Sue Wagner). Additionally, the explanation for the 1990 ballot question, authorizing the constitutional amendment and permitting the Legislature to establish a family court, provided that ''[t]he *district judge* of this court would specialize in domestic matters.'' Nevada Ballot Questions 1990, Nevada Secretary of State, Question No. 1 (emphasis added). According to the hearings conducted to establish a family court division under S.J. Res. 24, it is apparent that the Legislature intended that the judges sitting in the family court division would be district court judges and retain the same constitutional powers.

Legislative history of NRS 3.223

NRS 3.223 establishes the original and exclusive jurisdiction of the family court division, along with cases in which the family court may have concurrent jurisdiction. NRS 3.223 was conceived from two bills introduced during the 1991 legislative session, As-

[2]The dissenting justices inaccurately characterize our holding as, in essence, declaring NRS 3.223 unconstitutional. This is simply not the case. Rather, our opinion holds that the statutory language establishing the matters that the family court may hear does not limit the constitutional powers given to a district court judge to decide all cases and controversies under Article 6, Section 6 of the Nevada Constitution. *See Strickland v. Waymire*, 126 Nev. 230, 241, 235 P.3d 605, 613 (2010) (''The constitution may not be construed according to a statute enacted pursuant thereto; rather, statutes must be construed consistent with the constitution.'' (quoting *Foley v. Kennedy*, 110 Nev. 1295, 1300, 885 P.2d 583, 586 (1994))).

The Nevada Constitution was amended to create a family court with district court judges that would be required to have special training, education, and expertise in family matters. Our harmonization of the constitutional language at issue does not defeat or hinder that purpose.

sembly Bill (A.B.) 278 and Senate Bill (S.B.) 395. *See* A.B. 278, 66th Leg. (Nev. 1991); S.B. 395, 66th Leg. (Nev. 1991). Though similar, the bills contained two material differences: first, A.B. 278 asked for more judges than did S.B. 395; and second, A.B. 278 called for a direct election of family court judges, whereas S.B. 395 allowed for the election of district court judges who would then be assigned to or rotated into the family court division. Hearing on A.B. 278 Before the Assembly Judiciary Comm., 66th Leg. (Nev., May 8, 1991) (testimony of Senator Dina Titus). At a hearing on S.B. 395, Senator Dina Titus testified regarding one of the material differences in the bills that:

> [t]he senate follows a model used in Clark County now, wherein an individual would run as a district court judge, and every 2 years that individual rotates into the position of family court judge. It was felt by the senate committee that running for a family court judge, rather than district court judge would place a tremendous political burden on individuals who stand for election, based on the sensitive cases involved with the family court system. Family matters would become political matters, and family court judges would have to run on questions involving abortion, child abuse, child support, and other controversial situations.

Hearing on S.B. 395 Before the Senate Finance Comm., 66th Leg. (Nev., May 30, 1991). Senator William Raggio also expressed concern over limiting a family court judge's jurisdiction, commenting as follows:

> I just don't support this concept that [judges in family court] should be able to have jurisdiction for a limited purpose only in this area. I believe they should be district judges that sit in these departments, but when there is a calendar lag they should be available for other service.

Hearing on S.B. 395 Before the Finance Comm., 66th Leg. (Nev., June 12, 1991). Additionally, the following colloquy occurred during a legislative hearing on the issue of electing judges to the family court:

> [SENATOR GLOMB:] Just for clarification, this means they would not specifically run as a family-court judge, but as a district court judge, and would rotate into that position.
>
> . . . .
>
> [SENATOR RAGGIO:] As I understand the bill, the judges will establish, within their judicial districts, family courts. It would be my understanding that these judges would run, with the understanding that they would be assigned to these family courts.
>
> . . . .

> [SENATOR COFFIN:] As I can see it, there is nothing to prohibit judges running directly for that responsibility, though. As the motion reads, a person could run, and run on that platform of intending to serve as a family-court judge.
>
> . . . .
>
> [SENATOR RAGGIO:] That would be their indication, but under the law would not be limited to serving only as family-court judges.

Id. The Legislature ultimately adopted S.B. 395, prescribing the jurisdiction of the family court division, and resolved that the presiding judge in a district ''may assign one or more judges of the district to act temporarily as judges of the family court.'' 1991 Nev. Stat., ch. 659, § 2, at 2174. In light of the legislative history surrounding NRS 3.223, we conclude that the Legislature intended that the judges sitting in the family court division are district court judges.

The Nevada Revised Statutes indicate that family court judges are district court judges

Besides determining the original and exclusive jurisdiction of the family court, S.B. 395 also consistently amended other statutes that support our conclusion that the judges sitting in the family court division are district court judges. NRS 293.197(2)(a) requires election ballots for judges in the family division to use the words: ''district court judge, family division, department,'' *see* 1991 Nev. Stat., ch. 659, § 24, at 2185, and similarly, the Legislature has determined that in districts with a family court division, a certain number of district court judges must be judges of the family court. *See* NRS 3.012, 3.018. Therefore, we conclude that only district court judges have power to sit in the family court.

A district court judge sitting in family court retains his or her judicial power

[Headnotes 8, 9]

NRS 3.223 does not limit the constitutional power and authority granted under Article 6, Section 6(1) to a district court judge sitting in the family court division. Before discussing the original and exclusive jurisdiction of the family court division created by statute, we must distinguish between the court's subject matter jurisdiction and a judge's judicial power. Subject matter jurisdiction is ''the court's authority to render a judgment in a particular category of case.'' *J.C.W. ex. rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 253 (Mo. 2009). However, '' '[j]udicial [p]ower' is the authority to hear and determine justiciable controversies,'' *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967), and also includes the power to make and enforce final decisions. *Bergman*

v. Kearney, 241 F. 884, 898 (D. Nev. 1917). In Nevada, judicial power is derived directly from Article 6, Section 6(1) of the Nevada Constitution, empowering judges with the authority to act and determine justiciable controversies. Additionally, Section 6(1) also prescribes the jurisdiction of the district courts, but the subject matter jurisdiction of the family court division has been reserved by legislative enactment under Section 6(2) and ultimately established by NRS 3.223.[3]

NRS 3.223 details that the family court division has original and exclusive jurisdiction over matters affecting the familial unit including divorce, custody, marriage contracts, community and separate property, child support, parental rights, guardianship, and adoption. However, the family court was constitutionally established as a ''division of any district court,'' Nev. Const. art. 6, § 6(2), and the judges sitting in family court are district court judges whose power and authority are derived from the Constitution and not created statutorily. Even though the Legislature has specified cases that must be designated to the family court division, the construct of judicial power derives from the Nevada Constitution and is not diminished by legislatively enacted jurisdictions. Therefore, because a district court judge is empowered with constitutional judicial power, his or her disposition, although outside the scope of the family court's jurisdiction, is authorized by the Constitution.

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[3]In this case we must determine whether a district court judge sitting in the family court division is authorized to decide matters beyond those listed in NRS 3.223. The dissenting justices conclude that judges assigned to family court cannot, but the dissenting justices' analysis is focused on where the case is filed rather than the authority of the district court judge to decide it. Nothing in the dissent's recitation of the history of the constitutional amendment provides support for their conclusion that a district court judge's power to decide cases and controversies is limited when the judge is sitting in the family court division. Rather, the legislative history they cite addresses only the issue of whether the Legislature could create a specialty court without a constitutional amendment. Nothing in that debate addressed any limitation on a district court judge's power to hear controversies set forth in Article 6, Section 6(1). The legislative history we cite demonstrates that the Legislature, in enacting NRS 3.223, did not intend to curtail the constitutionally provided judicial powers given to all district court judges to hear all controversies set forth in Article 6, Section 6(1) simply by virtue of the district court judge's assignment to the family court division. Instead, the purpose was to create a specialty court with specially trained judges. Two of the dissenting justices acknowledge as much, but would require a judge to be reassigned out of the family court division before he or she could use their full judicial powers.

Justice Cherry, in his separate dissent, concludes that the Legislature has the constitutional authority to render the judges assigned to the family division limited jurisdiction judges.

The collective conclusions of the dissents are not consistent with Nevada Constitution Article 6, Section 6(1)'s broad jurisdictional mandate that applies to all district court judges.

This approach is confirmed by statutory analysis, review of previous Nevada caselaw, and authority from sister jurisdictions. All judges in Nevada must attend instructional courses ''[i]n court procedure, recordkeeping and the elements of substantive law appropriate to a district court.''[4] NRS 3.027. However, in jurisdictions with a family court division, only family court judges must attend additional instructional courses ''designed for the training of new judges of juvenile courts and family courts.''[5] NRS 3.028(1). Thus, the Legislature's purpose is also clear when it limits assignment to hear family court matters to those judges who have obtained the necessary instruction. Certainly, by requiring additional instruction for judges sitting in the family court division, the Legislature intended not to limit the power and authority of the district court judge, but rather to specify the qualification and training necessary for a district court judge to preside in the family court division. *Contra* NRS 3.0105(4) (''A district judge [temporarily] assigned to the family court . . . for a period of 90 or more days must attend the instruction required [of a family court judge].'').

As such, in addition to the training necessary to hear specialized matters of family law, a judge sitting in family court has all the constitutional powers and procedural and substantive instruction of a district judge. Notably, in jurisdictions that do not have family courts, district court judges attend training on issues of family law and preside over cases falling within the district court's general jurisdiction and proceedings that fall within what would be the exclusive jurisdiction of the family court. *See* NRS 3.028(2).

By creating a family court division, prescribing its jurisdiction, mandating the number of district court judges who must be judges of the family court, and requiring specialized instruction and training, the Legislature did not restrict the judicial powers of a district court judge sitting in the family court division. Indeed, it would not have the constitutional authority to do so. Instead, the Legislature has recognized that district court judges sitting in the family court division have expanded authority to hear family court disputes by virtue of their specialized training.

Our dissenting colleagues fret that our interpretation ''leaves district court judges not assigned to the family court division with less

[4]District court judges, other than family court judges, must attend instructional courses within 12 months after taking office, while family court judges must attend instructional courses within 24 months after taking office. *See* NRS 3.027(1)(a), (b). Family court judges are required to attend the same instructional courses as the district court judges under NRS 3.027(1), but are allotted more time in order to accommodate their court calendars and additional required courses. *See* Hearings on S.B. 394 Before the Senate Judiciary Comm., 68th Leg. (Nev., May 4, 1995, and June 6, 1995).

[5]In judicial districts that do not have family courts, district judges must also attend instruction ''in a course designed for the training of new judges of juvenile courts and family courts.'' NRS 3.028(2).

authority to hear cases than district court judges who are assigned to the family court division . . . .'' Nothing in our interpretation of Article 6 constrains the general jurisdiction district court judges from sitting in the family court. The dissenting justices' concern ignores NRS 3.0105(2) and (3), which unequivocally allow general jurisdiction district court judges to sit in the family court division. The only limitation is that if the general jurisdiction district court judge is going to sit in the family court division for longer than 90 days, the judge ''must attend the instruction required [of district court judges assigned to the family court division].'' NRS 3.0105(4). This legislative limitation of a general jurisdiction district court judge's ability to sit in the family court division is permitted under the constitutional amendment enabling the Legislature to establish and prescribe the jurisdiction of a family court. Nev. Const. art. 6, § 6(2)(b).

Accordingly, because we hold that a district court judge in the family division has the same constitutional power and authority as any district court judge, a family court judge has the authority to preside over a case improperly filed or assigned to the family court division.[6]

Our precedent supports the conclusion we reach today. In *Mainor v. Nault*, we distinguished a district court judge's jurisdiction to decide matters in the district court from a family court judge's jurisdiction to decide matters in the family court. 120 Nev. 750, 760, 101 P.3d 308, 315 (2004). We concluded that by enacting legislation granting concurrent and coextensive jurisdiction to district court judges, the Legislature intended to allow judges to hear cases in other districts, but not to allow district court judges concurrent and coextensive jurisdiction over cases reserved to the family court. *Id.*; *see* NRS 3.220. To that end, this court explained that ''the Legislature, by creating family courts and giving them exclusive original jurisdiction over certain matters, removed oversight of [proceedings expressly set forth in NRS 3.223] from the district court's jurisdiction in jurisdictions that have separate family courts.'' *Mainor*, 120 Nev. at 760, 101 P.3d at 315. Conversely, however, the Legislature could not revoke the power of a judge sitting in the family court division to hear proceedings that lie outside the family court's jurisdiction, because a judge sitting in the family court has the constitutional powers of a district judge.

This concept is reflected, in part, in our holding in *Barelli v. Barelli*, where we considered whether the Legislature's grant of

[6]This issue is not likely to arise often because local rules serve to prevent litigants from purposefully filing in family court when their claims have no arguable relation to the proceedings set forth in NRS 3.223. *See* EDCR 1.60(h); WDFCR 37. Additionally, the chief judge has the authority to reassign cases incorrectly filed in the family court division to a more appropriate venue. *See* EDCR 1.60; *see also* WDCR 2; NRS 3.025.

limited and exclusive jurisdiction to the family court prohibits the family court from adjudicating matters outside its exclusive jurisdiction but related to its jurisdictional authority. 113 Nev. 873, 877, 944 P.2d 246, 248 (1997). *Barelli* concerned an unmarried couple involved in a strictly contractual dispute, the resolution of which had the potential to revive claims for alimony and community property. *Id.* at 878, 944 P.2d at 249. We concluded that the family court had jurisdiction ''to resolve issues that fall outside [its] jurisdiction when necessary for the resolution of those claims over which jurisdiction is properly exercised.'' *Id.* To that end, our holding in *Barelli* recognized that a judge sitting in the family court division had the constitutional power to resolve a case and supplemental jurisdiction over other issues in the case.

Additionally, sister jurisdictions that come to the opposite conclusion base their decisions on statutes and constitutional constructs that differ from Nevada. Unlike Nevada, the family courts in these sister states are created either by statute or by the constitution, and the family court judges' judicial powers are limited and distinguishable from the judicial powers of a general jurisdiction district court judge in those states. *See* Del. Code Ann. tit. 10, § 925 (2009) (detailing the general jurisdiction of both the family court and the family court judge); N.Y. Fam. Ct. Act §§ 151-158 (McKinney 2009) (granting the general powers of the family court and the family court judges); N.Y. Fam. Ct. Act § 141 (McKinney 2009) (requiring special legal training for the ''office of family court judge''); N.Y. Const. art. 6, § 13 (establishing the family court and appointment or election of family court judges); N.Y. Const. art. 6, § 20 (specifying the qualification for judicial office and distinguishing between ''[a] judge of the court of appeals, justice of the supreme court, judge of the court of claims, judge of a county court, judge of the surrogate's court, judge of the family court or judge of a court for the city of New York''); R.I. Gen. Laws § 8-10-3 (2009) (''There is hereby established a family court, consisting of a chief judge and eleven (11) associate justices, to hear and determine all petitions for divorce . . . .'').

[Headnote 10]

Furthermore, a district court judge sitting in another court does not lose his or her judicial power. The California Court of Appeal stated that ''when a judge [of the district court] sits as a judge of the juvenile court, he is sitting as a judge of the [district] court, exercising a part of the general jurisdiction conferred by the law . . . , and is referred to as a judge of the juvenile court.'' *Singer v. Bogen*, 305 P.2d 893, 899 (Cal. Ct. App. 1957).

[Headnote 11]

We therefore conclude that in Nevada, a judge sitting in the family division is a district court judge who retains his or her judicial

powers derived from the Constitution to dispose of justiciable controversies.

The family court abused its discretion regarding entry of default judgment

[Headnote 12]

Because we conclude that the district court judge had the constitutional power and authority to adjudicate this case, we must determine whether the district court abused its discretion when it refused to set aside the default and subsequently entered default judgment.

Landreth argues that the district court abused its discretion by failing to set aside the entry of default because Malik did not send a second notice of intent to file a default after granting Landreth extensions of time to file an answer. Therefore, Landreth argues that good cause existed to set aside the default under NRCP 55(c). Malik argues that there is no requirement that he provide subsequent notices, even if he granted additional time extensions after first giving notice. This court reviews a lower court's decision to set aside an entry of default for an abuse of discretion. *Sealed Unit Parts v. Alpha Gamma Ch.*, 99 Nev. 641, 643, 668 P.2d 288, 289 (1983), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997); *Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992).

Notice requirements for default and default judgment

First, we distinguish between the notice requirements for an entry of default, which is set forth in RPC 3.5A and *Rowland v. Lepire*, 95 Nev. 639, 600 P.2d 237 (1979), and that for the entry of a default judgment, which is set forth in NRCP 55(b)(2), as the differing requirements were conflated by the parties in this case. RPC 3.5A states that a lawyer who ''knows . . . the identity of a lawyer representing an opposing party . . . should not take advantage of the lawyer by causing any default or dismissal to be entered without first inquiring about the opposing lawyer's intention to proceed.'' *See also Rowland*, 95 Nev. at 640, 600 P.2d at 237-38. Inquiring about the opposing party's intent to proceed before requesting a default, however, is not the same as the three-day notice required before a party can seek a default *judgment* under NRCP 55.

NRCP 55 states that a court may enter judgment by default against a party who has failed to defend a civil action. Where a party against whom default judgment is sought has appeared in the action, NRCP 55(b)(2) requires the applying party to satisfy heightened notice standards. Specifically, the rule requires that the party against whom judgment by default is sought must be

served ''with written notice of the application for judgment at least 3 days prior to the hearing on such application.'' NRCP 55(b)(2). Therefore, before seeking an entry of default in a case, a party must inquire into the opposing party's intent to proceed, and once default is entered and before seeking a default judgment, the party must serve a three-day notice to satisfy NRCP 55(b)(2).

In this case, on December 14, 2006, Malik sent a three-day notice of intent to file default *judgment* under NRCP 55(b)(2). The default was not even entered by the clerk of the court until February 27, 2007, and consequently no default judgment (and no three-day notice of intent to obtain default judgment) could be made until after that date.[7] Malik conflates the notice requirements for default set out in RPC 3.5A and *Rowland* with the three-day notice requirement for default judgment of NRCP 55(b)(2). Even if the December 14, 2006, notice could be considered an inquiry about Landreth's intent to proceed before Malik sought default, satisfying RPC 3.5A and *Rowland*, once Malik granted more time extensions,[8] he had a renewed duty under RPC 3.5A and *Rowland* to again inquire about Landreth's intent to proceed before seeking a default.

The district court's order declining to set aside the default

[Headnote 13]

The family court denied Landreth's motion to set aside the default and entered default judgment against Landreth, finding that Malik had offered Landreth numerous opportunities to answer but that her delay warranted the entry of a default judgment. However, in its order, the court did not discuss whether Landreth received proper notice of Malik's intent to seek default under RPC 3.5A and this court's decision in *Rowland*. Although it is undisputed that Malik first served Landreth with notice on December 14, 2006, the court did not address the additional extensions of time Malik granted Landreth after the initial December 14 notice or Malik's failure to send Landreth a second notice after granting the additional extensions. Our reasoning in *Rowland*—that an attorney should determine the opposing party's intent to proceed in a lawsuit before seeking default—applies equally to subsequent and additional extensions of time to file responsive pleadings as it does to initial grants of extensions.

RPC 3.5A and *Rowland* require a party to determine its opponent's intent to respond before requesting a default. Malik failed to

[7]We do note that Malik satisfied NRCP 55(b)(2) by sending a notice of hearing for the default judgment on March 22, 2007, more than three days before the default judgment was entered on April 2, 2007.

[8]Malik admitted to granting time extensions after the December 14 notice in his opposition to Landreth's motion to set aside the default.

do so in this case. Although he admitted that he granted further time for Landreth to file an answer after serving her with a notice of intent to seek default, Malik failed to provide her with a subsequent notice of intent to seek default before filing a request for default from the district court. Therefore, we conclude that the district court abused its discretion by denying Landreth's motion to set aside the default under NRCP 55(c).

CONCLUSION

Accordingly, because we conclude that a family court judge maintains all the constitutional powers of a district court judge, we hold that the family court judge did not lack judicial power or authority to consider the substantive and procedural aspects of Malik's complaint and enter judgment in this case. Nonetheless, we reverse the default judgment because the district court abused its discretion in upholding the default judgment when Malik did not serve Landreth with proper notice of his intent to seek default after granting Landreth additional extensions to file an answer.

SAITTA, GIBBONS, and PARRAGUIRRE, JJ., concur.

DOUGLAS, C.J., with whom PICKERING, J., agrees, dissenting:

I would deny the petition for rehearing and, therefore, I dissent.

While reasonable minds may disagree as to the plain meaning of a constitutional provision, I am concerned that the majority's opinion short-circuits standard jurisdictional requirements by implying that a district court judge enlarges the family court's jurisdiction simply by showing up for work. A court may exercise judicial power only when it has subject matter jurisdiction. *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838) (''Jurisdiction is the power to hear and determine the subject matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them . . . .''). A judge's power is not personal, as the majority's holding seems to suggest. It is institutional. If the court has jurisdiction, a duly qualified judge can preside over a dispute brought before that court. But if the court does not have jurisdiction, the judge cannot proceed. Jurisdiction belongs to the court, in other words; it is not a personal attribute of the judge. *See People v. Osslo*, 323 P.2d 397, 413 (Cal. 1958) (''[T]he jurisdiction which the judge exercises is the jurisdiction of the court, not of the judge.''); *White v. Superior Court*, 42 P. 480, 482 (Cal. 1895) (''[T]he jurisdiction [judges] exercise in any cause is that of the court, and not the individual.'').

The majority holds that all district judges have equal power to determine all cases and controversies under the Constitution. I do not disagree with this proposition in general; district court judges elected to family court positions could, if reassigned to divisions other than family court, preside over matters outside the family

court division's jurisdiction. However, I disagree that a district judge sitting in the family court division can entertain disputes no piece of which lies within the original jurisdiction of that division of the district court.

Today's holding is inconsistent with the plain language of Article 6, Section 6 of the Nevada Constitution and its pertinent history. Before the voters amended it in 1990, Article 6, Section 6 of the Nevada Constitution created the district courts and gave them their jurisdiction directly:

> The District Courts in the several Judicial Districts of this State have original jurisdiction in all cases excluded by law from the original jurisdiction of justices' courts. They also have final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law. The District Courts and the Judges thereof have power to issue writs of Mandamus, Prohibition, Injunction, Quo-Warranto, Certiorari, and all other writs proper and necessary to the complete exercise of their jurisdiction. The District Courts and the Judges thereof shall also have power to issue writs of Habeas Corpus.

This provision (which remains as paragraph 1 of Article 6, Section 6 of the Nevada Constitution) did not give the Legislature the power to define or limit the district courts' jurisdiction. This led some to conclude that the Legislature could not create a specialized court with jurisdiction limited to family law matters without amending Article 6, Section 6 of the Nevada Constitution to give the Legislature that authority. Hearing on S.J. Res. 24 Before the Senate Judiciary Comm., 65th Leg. (Nev., January 24, 1989) (testimony of Judge Charles Thompson on behalf of the District Judges' Association noting that ''in 1985 and 1987 statutes were proposed to create a [family] division of the [district] court and it was my testimony then that I didn't think the legislature had the constitutional power to control the internal workings of the court, and that it would require a constitutional amendment'' for the Legislature to create a family court division). To eliminate that argument, the 1989 Legislature prepared and submitted to the voters a proposal to amend the Nevada Constitution to allow ''the establishment of family courts.'' 1989 Nev. Stat., file no. 26, at 2222.[1]

[1]In 1989, the District Judges' Association opposed the proposed constitutional amendment on the grounds that the courts, not the Legislature, should determine ''which cases [are] assigned to which judges.'' Hearing on S.J. 24 Before the Senate Judiciary Comm., 65th Leg. (Nev., January 24, 1989). This argument was noted and rejected by the 1989 Legislature. *Id.* (Assemblywoman Myrna T. Williams stating that the constitutional amendment was needed even though ''some judges felt family court was a constitutional issue''; Senator Wagner disagreeing that ''a constitutional amendment that would specifically delineate every single type of jurisdiction in the Constitu-

The proposal to amend Article 6, Section 6 to allow the Legislature to create and prescribe the jurisdiction of the family court division of the district courts was tendered to Nevada voters as Ballot Question 1 at the 1990 general election. Nevada Ballot Questions 1990, Nevada Secretary of State, Question No. 1, *available at* http://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf. It passed. This amendment added subparagraph 2(b) to Article 6, Section 6 of the Nevada Constitution. This subparagraph reads as follows:

> *The legislature may provide by law for:* . . . [*t*]*he establishment of a family court* as a division of any district court *and may prescribe its jurisdiction*.

(Emphases added.) *See* S.J. Res. 24, 64th Leg. (Nev. 1987); 1987 Nev. Stat., file no. 131, at 2444; S.J. Res. 24, 65th Leg. (Nev. 1989); 1989 Nev. Stat., file no. 26, at 2222.

The voters were told when they passed this amendment that they were giving the Legislature authority to create and define the jurisdiction of a specialized family court.[2] The ''argument against passage'' noted in the 1990 Ballot Question—which passed on a vote of 204,981 to 105,338—was more or less the argument the majority revives, *see supra* note 1, and adopts here: ''The proposal, if approved, would allow the Legislature to establish a structure of family courts, which some judges oppose as inappropriate [legislative] regulation of the judicial system. *The proposal* . . . *does not define the jurisdiction of family courts, but would allow the Legislature to make that determination*.'' Nevada Ballot Questions 1990, Nevada Secretary of State, Question No. 1, *available at* http://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf (emphasis added). *See Strickland v. Waymire*, 126 Nev. 230, 235 P.3d 605 (2010) (in interpreting a

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tion'' was needed; ''a constitution is not a document which one burdens with specifics, but uses it as a general guideline of government, and then the statutes take over in terms of spelling out that jurisdiction'').

[2]The 1990 voters who passed Ballot Question No. 1 were given this explanation of its purpose:

> District courts have general jurisdiction over most civil and criminal matters. In general, district court judges do not specialize in a particular area. They hear all cases filed in their courts. If this amendment is adopted, the Legislature would be authorized to establish a family court in each judicial district of the state and determine those matters which the family court could consider. . . . If the Legislature establishes a family court, it would be required to establish which cases the court could hear, such as divorce, child support, child custody, adoption and the termination of parental rights.

Nevada Ballot Questions 1990, Nevada Secretary of State, Question No. 1, *available at* http://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/1990.pdf.

constitutional amendment passed by the voters, the ballot question and its accompanying literature may be consulted, as may legislation passed at or about the time of the amendment, in construing the amendment).

The Legislature enacted NRS 3.223 pursuant to the authority conferred on it by the 1990 amendment to Article 6, Section 6 of the Nevada Constitution.[3] In NRS 3.223, the Legislature expressly limits the jurisdiction of the family court to the matters specified therein. Based on Article 6, Section 6(2)(b) of the Nevada Constitution and NRS 3.223, I would hold that the family court lacks jurisdiction over matters not set forth in that statute, except to the extent they are integrally related to a dispute within that court's statutory jurisdiction. Resolving a financial dispute between parties to a cohabitant, property-sharing relationship does not fall within any of the categories of dispute NRS 3.223 gives the family court original jurisdiction to hear. Without original jurisdiction over some aspect of the parties' dispute, a limited jurisdiction court cannot exercise pendent or supplemental jurisdiction over matters it otherwise could not hear. *See Barelli v. Barelli*, 113 Nev. 873, 877-78, 944 P.2d 246, 248-49 (1997). Additionally, as to the majority's use of *Barelli*, I feel an expansive reading of *Barelli* is incorrect; *Barelli* should be limited to being read as ''related'' matters within NRS 3.223 so as to keep our specially trained jurists of the family division in family matters instead of capital murder cases, construction defect cases, and business cases.

In interpreting our Constitution, this court should not lightly find ambiguity or irreconcilable conflict among its provisions. *Cf. Governor v. Nevada State Legislature*, 119 Nev. 277, 287, 71 P.3d 1269, 1275-76 (2003) (declaring the obligation to fund education in ''irreconcilable conflict'' with the provision requiring a supermajority to pass revenue-raising measures), *clarified on denial of reh'g in Governor v. Nevada State Legislature*, 119 Nev. 460, 76 P.3d 22 (2003), *and overruled by Nevadans for Nevada v. Beers*, 122 Nev. 930, 142 P.3d 339 (2006). Constitutional interpretation utilizes the same rules and procedures as statutory interpretation. *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170 (2008). Thus, it is imperative that, in addressing our Constitution, this Court harmonize all provisions in the Constitution, giving meaning to each. *See Ex Parte Shelor*, 33 Nev. 361, 373-74, 111 P. 291, 292-93 (1910) (''It is not to be supposed that any words have been employed without occasion, or

[3]The statute was passed as a companion to the constitutional amendment. Both the statute and the ballot materials by which Article 6, Section 6(2)(b) became part of our Nevada Constitution are directly relevant to its interpretation. I believe that the majority's holding, which in essence is that NRS 3.223 is unconstitutional, is contrary to the express mandate of the voters and the Legislature.

without intent that they should have effect as part of the law. Effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the court must harmonize them, if practicable, and must lean in favor of a construction that will render every word operative, rather than one which may make some words idle and nugatory.' '' (quoting Thomas Cooley, *Constitutional Limitations* 72 (6th ed. 1890))). The majority's constitutional analysis too readily finds ambiguity and conflict in Article 6, Section 6.

The provisions in Article 6, Section 6 of the Nevada Constitution are not ambiguous. Courts and judges have power that is ''necessary to the complete exercise of their jurisdiction,'' Nev. Const. art. 6, § 6(1), and the Legislature was authorized to ''prescribe [the family court's] jurisdiction.'' Nev. Const. art. 6, § 6(2)(b). The Legislature exercised its constitutional power to ''prescribe [the] jurisdiction'' of the family court division of the district court when it enacted NRS 3.223. This statute vests exclusive jurisdiction over enumerated family-law-related matters in the family courts it establishes. In so doing, it took jurisdiction over family-law-related matters away from the regular division of the district court in districts with family law divisions but left jurisdiction over all non-family-law-related matters in the regular division of the district court.

The majority's reading fails to harmonize these provisions. Instead, it leaves district court judges not assigned to the family court division with less authority to hear cases than district court judges who are assigned to the family court division and by law have exclusive jurisdiction over all family-law-related matters. This result violates the very constitutional holding the majority declares. If Article 6, Section 6, Subsection 1 imbues every district court judge with complete jurisdiction over all matters enumerated in that paragraph, then how is it constitutional that a district court judge in a district with a family court cannot exercise jurisdiction over family court matters, because such jurisdiction is exclusively vested in the family court division? The result is that the Legislature cannot, in fact, ''prescribe [the] jurisdiction'' of the family court division of the district court because every district judge, as a matter of constitutional law, must have the same jurisdiction as every other. Thus does the majority's construction of Article 6, Section 6 in effect read Paragraph 2(b) out of the Constitution.

Amici curiae offer the argument that rehearing is necessary because our prior holding closed the family court's doors to actions that appear to belong in the family court. For example, it was argued that actions arising under NRS Chapters 122A (regulating domestic partnerships), 125D (the Uniform Child Abduction Act), and other family matters clearly should be in family court though were omitted from its grant of jurisdiction. NRS 3.223. The solu-

tion to these complaints is not through an expansive interpretation of district court judge's constitutional powers, but legislative amendment of the jurisdiction-granting statute. Our family courts should not be exercising jurisdiction in situations not covered by legislative enactment. *See* Nev. Const. art. 6, § 6(2).

Since the complaint lays jurisdiction in the family court based solely on the parties' failed cohabitant relationship, the default judgment was invalid because the court lacked subject matter jurisdiction over their dispute. *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) (noting that when the district court lacks subject matter jurisdiction, the judgment rendered is void); Restatement (Second) of Judgments § 65 cmt. b (1982). With no subject matter jurisdiction to sustain it, the judgment should have been vacated on motion under NRCP 60(b)(4), assuming the motion was otherwise unobjectionable under *Matter of Harrison Living Trust*, 121 Nev. 217, 112 P.3d 1058 (2005). As this comports with the holding of *Landreth v. Malik*, 125 Nev. Adv. Op. 61, 221 P.3d 1265 (2009), I believe this petition for rehearing should be denied.

CHERRY, J., dissenting:

I join in the dissent issued by CHIEF JUSTICE DOUGLAS and JUSTICE PICKERING. In addition, I feel compelled to share my own thoughts on this unique matter. I hold our district judges of the family division in Clark and Washoe Counties in the highest regard and utmost esteem. These ''work horses'' have served our urban counties well since the creation of the family division in 1993. I was most satisfied with our previous decision in this matter and felt a rehearing was unnecessary. I did not feel that our previous decision relegated those dedicated jurists to an inferior position to our general jurisdiction judges in Clark and Washoe Counties, or our rural judges who have the onerous task of hearing civil, criminal, and family law cases.

What is clear to me from a reading of our constitution in Article 6, Section 6(2) is that the Legislature may provide by law for the establishment of a family court as a division of any district court and may prescribe its jurisdiction. The creation of said family court has been accomplished in our urban counties and the Legislature has, in fact, prescribed its jurisdiction. NRS 3.223.

The majority now invites these specially trained jurists of the family division to abandon their specialty in family matters and instead try capital murder cases, construction defect cases, and business court cases. To me, this is not what the public intended when the Constitution was amended to create a family division, nor does it serve the public's interest. Almost as important is that the majority misreads and misapplies the legislative history in creating the family division and holds that our Legislature does not have the

constitutional authority to limit the jurisdiction of judges in the family division, even though there is no ambiguity whatsoever in Article 6, Section 6(2) of the Nevada Constitution.

For the above reasons, I respectfully dissent from the majority opinion in this matter.

IN RE: AMERCO DERIVATIVE LITIGATION.

GLENBROOK CAPITAL LIMITED PARTNERSHIP; ALAN KAHN; RON BELEC; AND PAUL F. SHOEN, APPELLANTS, *v.* JOHN M. DODDS, AN INDIVIDUAL; RICHARD HERRERA, AN INDIVIDUAL; AUBREY JOHNSON, AN INDIVIDUAL; CHARLES J. BAYER, AN INDIVIDUAL; JOHN P. BROGAN, AN INDIVIDUAL; JAMES J. GROGAN, AN INDIVIDUAL; AMERCO, A NEVADA CORPORATION; EDWARD J. SHOEN, AN INDIVIDUAL; JAMES P. SHOEN, AN INDIVIDUAL; WILLIAM E. CARTY, AN INDIVIDUAL; MARK V. SHOEN, AN INDIVIDUAL; SAC HOLDING CORPORATION, A NEVADA CORPORATION; SAC HOLDING CORPORATION II, A NEVADA CORPORATION; THREE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; FOUR SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; FIVE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SIX SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SIX-A SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SIX-B SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SIX-C SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SEVEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; EIGHT SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; NINE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; ELEVEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TWELVE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; THIRTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; FOURTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; FIFTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SIXTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; SEVENTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; EIGHTEEN SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; NINETEEN SAC SELF-STORAGE LIMITED PARTNER-

SHIP, A NEVADA LIMITED PARTNERSHIP; TWENTY SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TWENTY-ONE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TWENTY-TWO SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TWENTY-THREE SAC SELF-STORAGE CORPORATION, A NEVADA CORPORATION; TWENTY-FOUR SAC SELF-STORAGE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP; TWENTY-FIVE SAC SELF-STORAGE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP; TWENTY-SIX SAC SELF-STORAGE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP; AND TWENTY-SEVEN SAC SELF-STORAGE LIMITED PARTNERSHIP, A NEVADA LIMITED PARTNERSHIP, RESPONDENTS.

No. 51629

May 12, 2011 252 P.3d 681

Appeal from a district court order dismissing a shareholder derivative action. Second Judicial District Court, Washoe County; Brent T. Adams, Judge.

Shareholders of parent corporation brought shareholder derivative suit against corporation's officers, storage facility subsidiary entities, and others, for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with prospective economic advantage, unjust enrichment, and other claims. The district court dismissed complaint for failure to adequately allege demand futility, and shareholders appealed. The supreme court, *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006), reversed and remanded. On remand, shareholders filed amended complaint. The district court again dismissed complaint on other grounds, and shareholders appealed. The supreme court, HARDESTY, J., held that: (1) prior settlement of shareholder derivative claim against officers of parent corporation based on previous transactions did not bar suit on derivative claims based on subsequent transactions that had not transpired at time of release; (2) shareholders did not lack standing to bring action on parent corporation's behalf under doctrine of *in pari delicto*; (3) adverse interest exception to general rule that acts of corporate agent are imputed to corporation did not apply to acts of parent corporation's officers and directors; (4) shareholders adequately alleged demand futility, as required for derivative claims; (5) shareholders' allegations adequately stated claim against one officer for breach of fiduciary duty of loyalty but not against other officers; (6) allegations were sufficient to state claim against subsidiary entities for aiding and abetting breach of fiduciary duty; (7) allegations did not state claim for ultra vires acts; (8) shareholders' allegations ade-

quately stated claim against officers for tortious interference with prospective economic advantage; and (9) shareholders' allegations adequately stated claim against subsidiary entities for unjust enrichment.

Affirmed in part, reversed in part, and remanded.

PICKERING, J., dissented in part.

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Jennifer B. Anderson*, Las Vegas; *Berman DeValerio* and *Joseph J. Tabacco, Jr.*, and *Christopher T. Heffelfinger*, San Francisco, California; *Latham & Watkins LLP* and *Marc W. Rappel, Brian T. Glennon*, and *Gene Chang*, Los Angeles, California; *Harold B. Obstfeld*, New York, New York; *Robbins Umeda LLP* and *Brian J. Robbins, Kevin A. Seely, Kelly McIntyre*, and *Gregory E. Del Gaizo*, San Diego, California, for Appellants.

Parsons Behle & Latimer and *Rew R. Goodenow*, Reno; *Irell & Manella LLP* and *David Siegel, Daniel P. Lefler*, and *Charles E. Elder*, Los Angeles, California, for Respondents John M. Dodds, Richard Herrera, Aubrey Johnson, Charles J. Bayer, John P. Brogan, and James J. Grogan.

Laxalt & Nomura, Ltd., and *Daniel Hayward*, Reno; *Morrison & Foerster, LLP*, and *Jack W. Londen*, San Francisco, California, for Respondent AMERCO.

McDonald Carano Wilson LLP and *Thomas R.C. Wilson* and *Matthew C. Addison*, Reno; *Pillsbury Winthrop Shaw Pittman LLP* and *Walter J. Robinson*, Palo Alto, California, for Respondents Edward J. Shoen, James P. Shoen, and William E. Carty.

Law Offices of Calvin R.X. Dunlap and *Monique Laxalt* and *Calvin R.X. Dunlap*, Reno; *Squire, Sanders & Dempsey L.L.P.* and *George Brandon* and *Brian A. Cabianca*, Phoenix, Arizona, for Respondents Mark V. Shoen and SAC entities.

1. ACTION.
   The defense of *in pari delicto* precludes a party who has engaged in wrongdoing from recovering when the party is at least partially at fault.
2. PRETRIAL PROCEDURE.
   To survive a motion to dismiss, a complaint must contain some set of facts, which, if true, would entitle the plaintiff to relief.
3. APPEAL AND ERROR.
   On appeal from an order granting a motion to dismiss, the supreme court considers all factual assertions in the complaint to be true and draws all reasonable inferences in favor of the plaintiff.
4. APPEAL AND ERROR.
   The supreme court applies de novo review to the district court's legal determinations on a motion to dismiss.

5. COMPROMISE AND SETTLEMENT; RELEASE.
   Prior settlement of shareholder derivative claim against officers of parent corporation arising from transaction that gave certain individuals control of parent corporation, in which agreement contained release provision with respect to claims ''that have been or could have been'' asserted and ''which now exist or heretofore have existed,'' did not apply to shareholder derivative claims against parent corporation's board of directors, officers, and subsidiary entities based on subsequent transactions that had not transpired at time of release.
6. COMPROMISE AND SETTLEMENT.
   Because settlement agreements are contracts, they are governed by principles of contract law.
7. RELEASE.
   Under contract law, when a release is unambiguous, the court must generally construe the release from the language contained within it.
8. CONTRACTS.
   The ultimate goal on a claim for breach of contract is to effectuate the contracting parties' intent; however, when that intent is not clearly expressed in the contractual language, the supreme court may also consider the circumstances surrounding the agreement.
9. RELEASE.
   Contractual release terms do not apply to future causes of action unless expressly contracted for by the parties.
10. APPEAL AND ERROR.
    The supreme court will apply de novo review to contract interpretation issues.
11. CORPORATIONS AND BUSINESS ORGANIZATIONS.
    Alleged participation by parent corporation in transactions with parent corporation's subsidiaries to detriment of parent corporation did not deprive parent corporation's shareholders of standing to bring derivative action on parent corporation's behalf for breach of fiduciary duty and aiding and abetting same under doctrine of *in pari delicto*.
12. ACTION.
    Standing generally consists of both a case or controversy requirement stemming from the federal Constitution and a subconstitutional ''prudential'' element; this analysis does not include consideration of equitable defenses, such as *in pari delicto*, as these issues are two separate questions, to be addressed on their own terms; historically, Nevada requires an actual justiciable controversy as a predicate to judicial relief. U.S. CONST. art. 3, § 2, cl. 1 *et seq*.
13. CORPORATIONS AND BUSINESS ORGANIZATIONS.
    The collusion of corporate insiders with third parties to injure the corporation does not deprive the corporation of standing to sue the third parties, though it may well give rise to a defense that will be fatal to the action.
14. ACTION.
    When a party suffers injury from wrongdoing in which he engaged, the doctrine of *in pari delicto* often prevents him from recovering for his injury.
15. ACTION.
    The rationale underlying the doctrine of *in pari delicto* is that there is no societal interest in providing an accounting between wrongdoers.
16. CORPORATIONS AND BUSINESS ORGANIZATIONS.
    In assessing whether the *in pari delicto* doctrine applies to a derivative action against a corporation, the court must first determine whether

acts of a director or officer are imputed to the corporation and then address the elements of the *in pari delicto* defense.

17. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Under basic corporate agency law, the actions of corporate agents are imputed to the corporation.

18. CORPORATIONS AND BUSINESS ORGANIZATIONS.
The rationale for imputing a corporate agent's acts to the corporation is to encourage corporate managers to carefully select and monitor those who are acting on the corporation's behalf.

19. CORPORATIONS AND BUSINESS ORGANIZATIONS.
If a corporate agent is acting on his or her own behalf, the agent's acts will not be imputed to the corporation; this is known as the adverse interest exception to the general rule that a corporate agent's acts are imputed to the corporation.

20. CORPORATIONS AND BUSINESS ORGANIZATIONS.
A corporate agent's actions must be completely and totally adverse to the corporation in order to invoke the adverse interest exception to the general rule that an agent's actions are imputed to the corporation, and the requirement that the act be totally adverse renders the application of this exception very narrow.

21. CORPORATIONS AND BUSINESS ORGANIZATIONS.
The rule that a corporate agent's acts must be totally adverse to the corporation's interest, as required to come under the adverse interest exception to the general rule that a corporate agent's acts are imputed to the corporation, avoids ambiguity when there is a benefit to both the insider and the corporation, and reserves this most narrow of exceptions for those cases—outright theft or looting or embezzlement—where the insider's misconduct benefits only the insider or a third party.

22. CORPORATIONS AND BUSINESS ORGANIZATIONS.
If a corporate agent's wrongdoing benefits the corporation in any way, the adverse interest exception to the general rule that the agent's acts are imputed to the corporation does not apply.

23. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Simply because an agent of the corporation has a conflict of interest or is acting mostly for his or her own self-interest will not invoke the adverse interest exception to the general rule that the acts of the agent are imputed to the corporation.

24. CORPORATIONS AND BUSINESS ORGANIZATIONS.
A limited exception to the adverse interest exception to the general rule that a corporate agent's acts are imputed to the corporation, whereby an agent's actions are imputed under the sole-actor rule to the corporation even if the agent totally abandons the corporation's interest; in accordance with the sole-actor rule, the adverse interest exception will not preclude imputation if the agent is the sole agent or sole shareholder of a corporation.

25. CORPORATIONS AND BUSINESS ORGANIZATIONS.
Because the sole-actor exception to the adverse interest exception to the general rule that a corporate agent's acts are imputed to the corporation operates to impute conduct otherwise subject to the adverse interest exception when the corporation and its agent are indistinguishable from each other, the presence of innocent decision-makers is only relevant to assess whether there is indeed a sole actor; if some corporate decision-makers are unaware of wrongdoing, then there exists no unity between the

agent and the corporation such that the agent's complete adversity will impute to the corporation.

26. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Adverse interest exception to general rule that acts of corporate agent are imputed to corporation did not apply to acts of parent corporation's officers and directors, and therefore, actions were imputed to parent corporation and its subsidiaries in shareholder derivative action against officers, directors, and subsidiaries based on allegations that officers and directors engaged in transactions for their personal benefit, in which claim officers and directors asserted defense of *in pari delicto*; shareholders did not allege that officers and directors had totally abandoned parent corporation's interests, parent corporation was not completely harmed by transactions, as it acquired management interest in subsidiaries and obtained fee for its operation of subsidiaries, and shareholders did not allege that officers and directors acted solely for their own benefit.

27. CORPORATIONS AND BUSINESS ORGANIZATIONS.

The defense of *in pari delicto* should not apply to shareholder derivative action against parent corporation's officers and directors, if the district court finds after necessary discovery and briefing that under the *Shimrak v. Garcia-Mendoza*, 112 Nev. 246, 912 P.2d 822 (1996), factors: (1) the public cannot be protected because the transaction has been completed, (2) no serious moral turpitude is involved, (3) the defendant is the one guilty of the greatest moral fault, and (4) to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff.

28. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Shareholders filing shareholder derivative suits face a heightened pleading requirement to state, with particularity, the demand for corrective action that the shareholder made on the board of directors and why shareholders failed to obtain such action, or the reasons for not making a demand, and the failure to satisfy the heightened pleading requirement justifies dismissal of the complaint for failure to state a claim upon which relief may be granted. NRCP 23.1.

29. CORPORATIONS AND BUSINESS ORGANIZATIONS.

To determine whether demand upon the board of directors for corrective action is excused, under the heightened pleading requirements for a shareholder derivative action, the court will apply standards articulated by the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244 (Del. 2000), and *Rales v. Blasband*, 634 A.2d 927 (Del. 1993); the *Aronson* test applies when the alleged wrongs constitute a business decision by the board of directors, whereas the *Rales* test is the appropriate demand futility analysis for when the board of directors considering a demand is not implicated in a challenged business transaction. NRCP 23.1.

30. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Under the *Rales v. Blasband*, 634 A.2d 927 (Del. 1993), test for determining demand futility, the court evaluates whether particularized facts in the shareholder derivative complaint raise a reasonable doubt that the current board of directors would be able to exercise its independent and disinterested business judgment in responding to a demand. NRCP 23.1.

31. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Corporate directors' impartiality with respect to a demand from shareholders for corrective action, for the purposes of the demand futility pleading requirements to a shareholder derivative action, can be shown

through allegations demonstrating that the majority is beholden to directors who would be liable. NRCP 23.1.

32. CORPORATIONS AND BUSINESS ORGANIZATIONS.

A corporate director's interestedness, for purposes of determining whether the director could exercise independent and disinterested business judgment in responding to shareholder's demand for corrective action, as required to satisfy the demand futility pleading requirement for a shareholder derivative action, can be demonstrated through alleged facts indicating that a majority of the board members would be materially affected, either to their benefit or detriment, by a decision of the board in a manner not shared by the corporation and the stockholders. NRCP 23.1.

33. CORPORATIONS AND BUSINESS ORGANIZATIONS.

A shareholder's allegations of mere threats to a corporate director of liability through approval of the wrongdoing or other participation is not enough to satisfy the demand futility pleading requirements for a shareholder derivative action. NRCP 23.1.

34. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Parent corporation's shareholders adequately alleged that director of parent corporation, who was also president of parent corporation's real estate subsidiary, lacked ability to exercise independent and disinterested business judgment in responding to shareholders' demand for corrective action with respect to transactions with subsidiaries, as required to meet demand futility pleading requirement for shareholder derivative action against directors and subsidiaries; shareholders alleged that director, while acting as president of real estate subsidiary, approved sale of approximately 100 properties to storage facility subsidiary entities at unfair prices, that he used real estate subsidiary's human resources and offices to help storage facility subsidiaries to locate, obtain, and develop valuable properties without compensation, and without having disclosed arrangements to shareholders, and that he approved over $100 million in nonrecourse loans to storage facility subsidiaries, which funds were then used to purchase properties from real estate subsidiary. NRCP 23.1.

35. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Parent corporation's shareholders adequately alleged that directors lacked ability to exercise independent and disinterested business judgment in responding to shareholders' demand for corrective action with respect to transactions with subsidiaries, as required to meet demand futility pleading requirement for shareholder derivative action against directors and storage facility subsidiaries; shareholders alleged that, while acting as directors for moving company subsidiary, they authorized millions of dollars in nonrecourse loans to storage facility subsidiary entities, that while acting as directors of real estate subsidiary, directors consented to sale of hundreds of properties to storage facility subsidiaries for unfair prices, that directors signed false parent corporation reports, and that one of the directors was the uncle of two other directors, and therefore exercised significant influence over other directors. NRCP 23.1.

36. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Allegations by shareholders of parent corporation that director had ''close, bias-producing relationship with'' other director; that, when other director attempted to take over parent corporation by issuing stock to trustworthy employees who allowed other director to vote their shares, other director selected director as one of employees who could purchase stock; and that director could not afford to purchase stock, so parent corporation and other director loaned director money, adequately alleged that

director lacked ability to exercise independent and disinterested business judgment in responding to shareholders' demand for corrective action with respect to transactions with storage facility subsidiary entities, as required to meet demand futility pleading requirement for shareholder derivative action against directors and subsidiaries. NRCP 23.1.

37. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Allegations by parent corporation's shareholders that three directors dominated and controlled parent corporation's board of directors; that they ''pack[ed] the [parent corporation's] Board with loyal subordinates''; and that they were in position to manipulate three other directors including director who was president of two subsidiaries, because three of them had power to fire other directors and discontinue their salaries and pension benefits; and adequately alleged that directors lacked ability to exercise independent and disinterested business judgment in responding to shareholders' demand for corrective action with respect to transactions with subsidiaries, as required to meet demand futility pleading requirement for shareholder derivative action against directors and subsidiaries. NRCP 23.1.

38. EVIDENCE.

The supreme court will generally not take judicial notice of facts in a different case, even if connected in some way, unless the party seeking such notice demonstrates a valid reason for doing so.

39. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Nevada does not recognize a cause of action for abuse of control, which is essentially a claim for breach of the fiduciary duty of loyalty.

40. CORPORATIONS AND BUSINESS ORGANIZATIONS.

The fiduciary duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests.

41. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Shareholders' allegations that executive officer of parent corporation caused corporation to sell property to subsidiary, over which he had ownership and control, at below-market prices, and that officer usurped opportunities for parent corporation that he had learned about as officer for parent corporation by causing subsidiary to buy properties despite his knowledge that parent corporation would have been interested in properties, without having obtained disinterested director approval, adequately stated claim against officer for breach of fiduciary duty of loyalty. NRS 78.138(7).

42. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Shareholders' allegations that officers of parent corporation retained undisclosed pecuniary interest in subsidiary entities in which executive officer had ownership interest and managed and that their self-interest in sale of property to subsidiary entities was increased through their familial tie with executive officer did not state claims against officers for breach of fiduciary duty of loyalty. NRS 78.138(7); NRCP 9(b).

43. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Shareholders' allegations in derivative action that officers of parent corporation knowingly signed misleading and incomplete public filings that failed to include details about loans to storage facility subsidiary that was owned and managed by another officer and that officers knew filings were false because, as officers of various other subsidiaries, they approved loans to subsidiary and were aware of details of transaction did not state

claim for breach of duty of loyalty with sufficient particularity, when allegation that public filings did not contain enough information about subsidiary did not demonstrate that officers engaged in intentional misconduct or fraud. NRCP 9(b).

44. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Parent corporation shareholders' allegations that storage facility subsidiary entities participated in corporate officers' breach of fiduciary duties by facilitating transfer of corporate assets at below-market prices, and that corporate officer also owned and controlled subsidiary entities, were sufficient to state claim against subsidiary entities for aiding and abetting breach of fiduciary duty.

45. FRAUD.

Four elements must be shown to establish a claim of aiding and abetting the breach of a fiduciary duty: (1) a fiduciary relationship exists, (2) the fiduciary breached the fiduciary relationship, (3) the third party knowingly participated in the breach, and (4) the breach of the fiduciary relationship resulted in damages.

46. CORPORATIONS AND BUSINESS ORGANIZATIONS.

Shareholders' allegation that parent corporation acted in violation of its articles of incorporation by engaging in transactions with subsidiary entities without obtaining shareholder approval did not state claim for ultra vires acts.

47. CORPORATIONS AND BUSINESS ORGANIZATIONS.

If a corporation's act was within the corporate powers, but was performed without authority or in an unauthorized manner, the act is not ultra vires.

48. TORTS.

Shareholders' allegations that parent corporation had prospective or contractual relationships with customers who rented storage units, as well as with third parties who owned and sold properties that could be used as self-storage locations; that officers of parent corporation were aware of such relationships and acted for benefit of storage facility subsidiary entities controlled and owned by one officer; that officers of parent corporation sold property to subsidiary entities at unfairly low prices; that such transactions prevented corporation from realizing profit it would have obtained otherwise from selling to outsiders; and that corporation and shareholders suffered harm as result, adequately stated claim against officers for tortious interference with prospective economic advantage.

49. PLEADING; TORTS.

A claim for wrongful interference with prospective economic advantage is not based on fraud; thus, it is not subject to the heightened pleading requirement on a claim for fraud. NRCP 9(b).

50. IMPLIED AND CONSTRUCTIVE CONTRACTS.

Parent corporation's shareholders' allegation that storage facility subsidiary entities received and retained money and property of parent corporation, and that they did so by engaging in transactions with parent corporation in form of nonrecourse loans to subsidiary entities and sale of corporate assets to subsidiary entities at unfairly low prices, adequately stated claim against subsidiary entities for unjust enrichment.

51. IMPLIED AND CONSTRUCTIVE CONTRACTS.

Unjust enrichment occurs whenever a person has and retains a benefit that in equity and good conscience belongs to another.

52. LIMITATION OF ACTIONS.

If the allegations contained in the complaint demonstrate that the statute of limitations has run, then dismissal upon the pleadings is appropriate.

53. FRAUD.
A breach of fiduciary duty is analogous to fraud, and thus, Nevada applies the three-year statute of limitations governing a claim of fraud. NRS 11.190(3)(d).

54. LIMITATION OF ACTIONS.
The three-year statute of limitations for a claim for breach of fiduciary duty does not begin to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach. NRS 11.190(3)(d).

55. LIMITATION OF ACTIONS.
When a fiduciary fails to fulfill his or her obligations and keeps that failure hidden, the three-year statute of limitations will not begin to run until the failure of the fiduciary is discovered, or should have been discovered, by the injured party. NRS 11.190(3)(d).

56. LIMITATION OF ACTIONS.
Mere disclosure of a transaction by a director, without disclosure of the circumstances surrounding the transaction, is not sufficient, as a matter of law, to commence the running of the three-year statute of limitations governing a claim for breach of fiduciary duty. NRS 11.190(3)(d).

57. LIMITATION OF ACTIONS.
A determination of when the plaintiff knew, or in the exercise of proper diligence should have known, of the facts constituting the elements of his or her cause of action for limitations purposes is a question of fact for the trier of fact.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

AMERCO is a Nevada corporation controlled by the feuding Shoen family. Its main operating subsidiary is U-Haul International, Inc. AMERCO has engaged in numerous business transactions with the SAC entities, which are real estate holding companies controlled by AMERCO shareholder and executive officer Mark Shoen. Based on several of those transactions, appellants filed the underlying shareholder derivative suit in 2002 against AMERCO's former and current directors, Mark, and the SAC entities, primarily for breach of fiduciary duty and aiding and abetting the breach of that fiduciary duty. However, appellants failed to make a demand for corrective action on the AMERCO board of directors, and subsequently, the district court granted respondents' motion to dismiss for failure to adequately allege demand futility. Appellants appealed that decision, and this court reversed and remanded for reconsideration, after clarifying the demand futility standards. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 626, 137 P.3d 1171, 1174-75 (2006). On remand, the district court once again granted respondents' motions to dismiss—this time on two grounds distinct from demand futility: (1) a settlement agreement entered into in 1995 by AMERCO and shareholders who are

not involved in this case, referred to as the *Goldwasser* settlement,[1] barred appellants' derivative claims; and (2) appellants could not pursue derivative claims against the SAC entities on behalf of AMERCO based on transactions in which AMERCO itself participated.

In this appeal, we first address whether a claim-release clause contained in the *Goldwasser* settlement agreement reached by different shareholders several years earlier bars the derivative claims now asserted by appellant shareholders. We conclude that it does not. When a settlement agreement does not contain language exhibiting a clear intent to release future claims, the release clause is limited to the claims that existed at the time the settlement agreement was reached.

[Headnote 1]

Second, we address whether appellant shareholders could bring their derivative claims against the corporation's alleged coconspirators. In doing so, we examine, for the first time, the defense of *in pari delicto*[2] in a corporate context, which first requires an analysis of whether an agent's acts are imputed to the corporation. We also clarify the adverse interest exception to imputation, which provides that when the officers have totally abandoned the corporation's interests, their actions are not imputed to the corporation. We further adopt the sole-actor rule, which operates as an exception to the adverse interest exception in limited circumstances. We conclude that the adverse interest exception and sole-actor rule do not apply in this case. Therefore, without more, the AMERCO officers' alleged actions are imputed to the corporation. We then address whether respondents can assert the *in pari delicto* defense, concluding that this is a question that must be remanded to the district court.

Finally, we address various arguments set forth by respondents regarding alternative grounds for affirming the district court's order of dismissal, including whether the district court properly held that appellants adequately pleaded demand futility, whether appellants sufficiently pleaded their causes of action, and whether appellants' claims are barred by the statute of limitations. We conclude that appellants adequately pleaded demand futility, but the district court must now conduct a proper evidentiary hearing regarding whether the evidence supports appellants' allegations; ap-

[1]The lead plaintiffs in the lawsuit that resulted in the 1995 settlement were named Goldwasser, and thus, the parties and the district court refer to it as ''the *Goldwasser* settlement.''

[2]The *in pari delicto* defense precludes a party who has engaged in wrongdoing from recovering when they are at least partially at fault. *Official Committee v. R.F. Lafferty & Co.*, 267 F.3d 340, 354 (3d Cir. 2001).

pellants sufficiently pleaded some, but not all, of their claims; and whether the statute of limitations has run is a question of fact for the district court. Accordingly, we affirm in part, reverse in part, and remand for further proceedings.

FACTS

To put our discussion in context, we present an overview of the factual and procedural background of this case.[3] AMERCO, a Nevada corporation, is the parent company of U-Haul, which Leonard Samuel (L.S.) Shoen founded in 1945. Through wholly owned U-Haul centers and other independent dealers, AMERCO rents trucks, trailers, and storage units to the public. AMERCO's other subsidiary, AMERCO Real Estate Corporation (AREC), controls ''the purchase, sale and lease of properties used by AMERCO.'' Several years before the instant litigation began, L.S. transferred most of his AMERCO stock to his children, leading ''to an unfortunate and well-documented family feud between shifting factions for corporate control.'' *Shoen*, 122 Nev. at 627, 137 P.3d at 1175. At the center of the feud are L.S.'s sons, appellant Paul and respondents Edward J. (Joe), James, and Mark Shoen.

Joe, James, and Mark created SAC Self-Storage Corporation and Two SAC Self-Storage Corporation in 1993 to serve as real estate holding corporations. The common stock issued by the two corporations was split evenly between Joe, James, and Mark. However, in December 1994, a short time before Joe and James filed for personal bankruptcy, they sold their shares to Mark, allegedly for $100. After this transaction, Mark Shoen owned and controlled SAC Self-Storage Corporation and Two SAC Self-Storage Corporation. In 1996, these two entities were merged into a new corporation called Three SAC. Since 1996, many additional SAC corporations or partnerships have been formed under Nevada law (referred to here as the SAC entities), and Mark controls each one.

In 2002 and 2003, Paul and other appellant shareholders Ron Belec, Alan Kahn, and Glenbrook Capital Limited Partnership filed individual derivative suits, which were subsequently consolidated, against Joe, James, and Mark, as well as against current and former AMERCO directors Charles Bayer, William Carty, John Dodds, Richard Herrera, Aubrey Johnson, John Brogan, and James Grogan. Appellants alleged that respondents breached their fiduciary obligations to AMERCO by engaging in improper and unfair transactions with the SAC entities to AMERCO's detri-

[3]A more detailed account of the factual background can be found in our previous opinion in this matter, *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 627-31, 137 P.3d 1171, 1175-78 (2006).

ment. The district court dismissed the complaints on the ground that demand futility was not pleaded adequately, *Shoen*, 122 Nev. at 626, 137 P.3d at 1175, and on appeal, this court ''clarif[ied] the pleading requirements for shareholder derivative suits pursuant to NRCP 23.1'' and remanded the case to the district court ''for further proceedings regarding demand futility.'' *Id.* at 644-45, 137 P.3d at 1186-87.

District court proceedings on remand

Upon reversing and remanding the matter in *Shoen*, appellants were permitted to file an amended complaint. *Id.* at 645, 137 P.3d at 1187. In the amended complaint, appellants set forth six causes of action. Appellants alleged: (1) breach of the fiduciary duty of loyalty by engaging in self-dealing against all of the former directors, (2) aiding and abetting a breach of the fiduciary duty of loyalty and unjust enrichment against the SAC entities, and (3) usurpation of corporate opportunities against Mark. Against all respondents, appellants also alleged: (1) engaging in ultra vires acts, (2) wrongful interference with AMERCO's prospective economic advantage, and (3) abuse of control. Appellants stated that they were ''seek[ing] to halt and unwind a series of self-dealing transactions'' that have resulted in the transfer of ''hundreds of self-storage properties and over $200 million of equity away from AMERCO to'' the SAC entities. Appellants contended that these were corporate opportunities that AMERCO was deeply focused on prior to the creation of the SAC entities. Thus, according to appellants, Joe, James, and Mark (with assistance from the other respondents) have benefited the SAC entities to AMERCO's detriment.

In their amended complaint, appellants alleged that AMERCO's transactions with the SAC entities were improper for three reasons. First, appellants contended that AMERCO sold properties to the SAC entities at unfairly low prices and failed to seek approval for the transactions from the AMERCO board of directors. The price for most self-storage properties was generally ''calculated at 'acquisition cost plus capitalized expenses,' '' which appellants alleged was unfair because, among other things, it failed to account for appreciation in the properties between the time AMERCO acquired them and the time it sold them to the SAC entities.

Second, appellants alleged that AMERCO financed the SAC entities' purchase of other properties by providing over $600 million in nonrecourse loans. Appellants contended that some of the loans occurred during financial downturns ''when AMERCO was in need of capital for its own business.''

Third, appellants alleged that AMERCO entered into management agreements, pursuant to which U-Haul operates self-storage facilities on behalf of the SAC entities. For each property that the

SAC entities acquired, they entered into a ''management agreement'' with U-Haul. Under these agreements, U-Haul is responsible for running the self-storage businesses, and in return, U-Haul receives a '' 'management fee,' equal to six percent of the 'gross revenue' generated from the self-storage property.'' Appellants alleged that such an arrangement is inequitable because the remaining 94 percent of revenue ''is kept by [Mark Shoen] and the SAC [e]ntities.''

Moreover, appellants alleged that AMERCO's public filings misled its shareholders regarding the SAC transactions. Appellants alleged that AMERCO's annual reports, quarterly reports, and proxy statements for fiscal years 1995 through 2002 referred to the SAC entities in a distorted and confusing manner, without any of the context necessary to understand the nature or scope of the relationship between AMERCO and the SAC entities. Additionally, appellants contended that AMERCO never disclosed how much revenue was collected from the SAC entities or discussed the transactions in its public filings.

Regarding demand futility, appellants set forth in the amended complaint several reasons why demand on AMERCO's board of directors would be futile. First, appellants alleged that ''a majority of the board has a material interest in the subject of the demand.'' Second, appellants contended that Joe, James, and Mark ''dominate and control the AMERCO Board,'' and thus the board is not independent of Joe, James, and Mark.[4]

AMERCO, acting through its board of directors, filed a motion to dismiss appellants' derivative action for failure to allege demand futility adequately. All other respondents also filed motions to dismiss appellants' amended complaint, based on the *Goldwasser* waiver and release in the *Goldwasser* settlement agreement, the *in pari delicto* doctrine, failure to state claims upon which relief may be granted, and the statute of limitations. The district court denied AMERCO's motion to dismiss, finding that appellants ''satisfied the heightened pleading requirements of demand futility by showing a majority of the members of the AMERCO Board of Directors were interested parties in the SAC transactions.'' The district court also scheduled a hearing for all issues, except demand futility, raised in the other respondents' motions to dismiss. Before recounting the hearing and the district court's subsequent ruling on the motions to dismiss, it is necessary to examine briefly the derivative suit that eventually resulted in the *Goldwasser* settlement.

[4]Appellants also argue that demand is excused because they alleged ultra vires acts. *See Shoen*, 122 Nev. at 642-43, 137 P.3d at 1185. While ''[d]emand futility analysis is conducted on a claim-by-claim basis,'' *Beam ex rel. M. Stewart Living v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003), as discussed hereafter, appellants have failed to state a claim for ultra vires acts.

The Goldwasser settlement

The events giving rise to the *Goldwasser* settlement began in 1988 when several shareholders filed suit in Arizona (the Arizona litigation), challenging a stock transaction that gave control of AMERCO to Joe, James, and Mark. The Arizona litigation resulted in a billion-dollar jury verdict in favor of the plaintiffs.

Subsequently, in 1994, AMERCO shareholders from the Arizona litigation, the *Goldwasser* plaintiffs, filed a shareholder derivative suit on behalf of AMERCO in federal court in Nevada against AMERCO management, including Joe, James, Mark, Bayer, Carty, Dodds, and Herrera. The *Goldwasser* plaintiffs sought, in part, an injunction to prevent Joe, James, and Mark from causing AMERCO to indemnify them in the judgment from the Arizona litigation. During discussions between the parties' counsel, the *Goldwasser* plaintiffs questioned the propriety of the diversion of corporate assets from AMERCO to the two SAC entities then in existence. The parties ultimately reached a settlement agreement in 1995. To assuage the *Goldwasser* plaintiffs' concerns regarding the SAC entities, a letter from AMERCO describing the SAC transactions was included in the agreement, and the settlement agreement contained a release clause whereby the *Goldwasser* plaintiffs agreed to release various claims against the defendants, including those claims related to matters addressed in the letter describing the SAC transactions.

District court hearing on the motions to dismiss

After the hearing on the alternative bases alleged for dismissal, the district court granted respondents' motions to dismiss on two separate grounds. First, the district court determined that ''the *Goldwasser* settlement released the claims which are the subject of this action.'' The court reasoned that because the *Goldwasser* plaintiffs raised derivative claims on behalf of AMERCO, the released claims, including those related to the letter describing the SAC transactions, ''were released on behalf of [AMERCO]'' and ''therefore, [appellants] cannot relitigate said claims on behalf of [AMERCO].'' Second, the district court found that appellants could not derivatively sue the SAC entities. The court reasoned that because AMERCO ''participated in the challenged transactions,'' appellants cannot file a derivative claim on AMERCO's behalf for those transactions. This appeal followed.

DISCUSSION

Standard of review

[Headnotes 2-4]

A district court order granting a motion to dismiss ''is rigorously reviewed.'' *Shoen*, 122 Nev. at 634-35, 137 P.3d at 1180. To

survive dismissal, a complaint must contain some ''set of facts, which, if true, would entitle [the plaintiff] to relief.'' *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Like the district court, this court considers all factual assertions in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *Shoen*, 122 Nev. at 635, 137 P.3d at 1180. This court applies de novo review to the district court's legal determinations. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

The Goldwasser settlement did not release appellants' claims

[Headnote 5]

The first ground upon which the district court granted respondents' motions to dismiss was that the claim-release clause in the *Goldwasser* settlement agreement precludes appellants' present claims. Appellants argue that the district court erred because the release clause was limited to claims in existence at the time that the parties reached the settlement agreement and did not apply to claims, like those asserted below, arising out of future transactions. We agree.

[Headnotes 6-10]

Because settlement agreements are contracts, they are ''governed by principles of contract law.'' *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). Under contract law generally, when a release is unambiguous, we must construe it from the language contained within it. *Chwialkowski v. Sachs*, 108 Nev. 404, 406, 834 P.2d 405, 406 (1992). Our ultimate goal is to effectuate the contracting parties' intent, however, when that intent is not clearly expressed in the contractual language, we may also consider the circumstances surrounding the agreement. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 487-88, 117 P.3d 219, 223-24 (2005). Typically, ''[c]ontractual release terms . . . do not apply to future causes of action unless expressly contracted for by the parties.'' *Clark v. Columbia/HCA Info. Servs.*, 117 Nev. 468, 480, 25 P.3d 215, 223-24 (2001). We apply de novo review to contract interpretation issues. *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

The *Goldwasser* settlement agreement's definition of released claims refers to those ''*that have been or that could have been* asserted in the Litigation or in the securities actions with which the Litigation is consolidated.'' (Emphasis added.) The released claims thus include unknown claims, which are ''any Released Claims which AMERCO or any Plaintiff does not know or suspect to exist in his, her or its favor, or derivatively in favor of AMERCO, *at the time of the release*.'' (Emphasis added.) The agreement then states that ''AMERCO and the Plaintiffs . . . shall be deemed to have . . . fully, finally and forever settled and released any and all

Released Claims, known or unknown, suspected or unsuspected, contingent or non-contingent, whether or not concealed or hidden, *which now exist or heretofore have existed*.'' (Emphasis added.)

We conclude that these clear and explicit terms limit the release to claims that were in existence at the time the *Goldwasser* settlement agreement was reached, including any claims related to the transactions with the two SAC entities that existed at that time, even if the facts giving rise to those claims had not yet been discovered. However, we conclude that claims arising out of any SAC transactions that occurred after the date of the release are not included in the release. Even if, as respondents contend, AMERCO indicated to the *Goldwasser* plaintiffs that future SAC transactions would occur, we reject the notion that claims arising from those prospective transactions were released. Not only does the agreement lack language that indicates any intent to release such future claims, but the express language refers to claims that existed at the time of the settlement agreement. Accordingly, we conclude that appellants' derivative claims, which arose out of SAC transactions that occurred post-*Goldwasser*, were not released in the settlement agreement. Thus, we affirm the district court's dismissal of appellant's derivative claims related to AMERCO's transactions with the two SAC entities, but we reverse that portion of the district court's order finding that the *Goldwasser* settlement agreement precludes appellants from pursuing the derivative claims on behalf of AMERCO pertaining to post-*Goldwasser* SAC transactions.

Appellants' claims against the SAC entities are not necessarily barred by the in pari delicto doctrine

[Headnote 11]

The district court granted respondents' motions to dismiss appellants' claims against the SAC entities on the ground that appellants lacked standing. As a preliminary matter, the district court's perception of this defense as a standing issue is somewhat flawed. The district court apparently imputed respondents' actions to AMERCO and relied on the *in pari delicto* doctrine to find that appellants' derivative claims filed on behalf of AMERCO were precluded because AMERCO ''participated in the challenged transactions and, therefore, cannot bring a claim against the SAC entities based on the transactions.''

[Headnotes 12, 13]

Although some courts conflate the concepts of standing and *in pari delicto*, we conclude that they are subject to separate analyses. The Second Circuit Court of Appeals has treated claims against a third party where wrongdoing was imputed to the corporation as an issue of standing, concluding that the corporation cannot bring a claim under those circumstances. *Shearson Lehman Hutton, Inc. v.*

Wagoner, 944 F.2d 114, 117-20 (2d Cir. 1991). However, this approach has been criticized, even within the Second Circuit, for mischaracterizing the *in pari delicto* defense as part of the standing analysis. *See In re Senior Cottages of America, LLC*, 482 F.3d 997, 1003 (8th Cir. 2007). Generally, '' '[s]tanding consists of both a ''case or controversy'' requirement stemming from Article III, Section 2 of the Constitution, and a subconstitutional ''prudential'' element.' '' *Official Committee v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001) (alteration in original) (quoting *The Pitt News v. Fisher*, 215 F.3d 354, 359 (3d Cir. 2000)). This analysis does not include consideration of equitable defenses, such as *in pari delicto*, as these issues are ''two separate questions, to be addressed on their own terms.'' *Id.*

Although state courts do not have constitutional Article III standing, ''Nevada has a long history of requiring an actual justiciable controversy as a predicate to judicial relief.'' *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). In Nevada, as in the federal courts, this standing analysis is separate from the existence of an equitable defense, such as *in pari delicto*. Therefore, ''the collusion of corporate insiders with third parties to injure the corporation does not deprive the corporation of standing to sue the third parties, though it may well give rise to a defense that will be fatal to the action.'' *In re Senior Cottages of America, LLC*, 482 F.3d at 1004; *see also In re American Intern. Group, Inc.*, 965 A.2d 763, 824 n.234 (Del. Ch. 2009) (recognizing that standing and *in pari delicto* are separate rules); *Reneker v. Offill*, 2009 WL 804134, at *6 n.6 (N.D. Tex. Mar. 26, 2009) (noting that *in pari delicto* is a defense to the merits of a claim but does not preclude a party's standing to bring that claim in the first place and that standing and the existence of equitable defenses are two separate issues). Thus, we conclude that the district court improperly concluded that AMERCO could not bring its claims because AMERCO's alleged participation in wrongdoing does not divest it of standing.

The in pari delicto doctrine

We have previously recognized the *in pari delicto* doctrine as an equitable defense in actions between individuals. *Shimrak v. Garcia-Mendoza*, 112 Nev. 246, 251-52, 912 P.2d 822, 826 (1996); *Magill v. Lewis*, 74 Nev. 381, 386, 333 P.2d 717, 719 (1958). However, we have not previously addressed the *in pari delicto* doctrine as it applies to corporations and shareholder derivative suits, and we take this opportunity to do so.

[Headnotes 14, 15]

When a party suffers injury from wrongdoing in which he engaged, the doctrine of *in pari delicto* often prevents him from re-

covering for his injury. *Lafferty*, 267 F.3d at 354; *American Intern. Group, Consol. Deriv. Lit.*, 976 A.2d 872, 883 (Del. Ch. 2009). The rationale underlying the doctrine ''is that there is no societal interest in providing an accounting between wrongdoers.'' *American Intern. Group*, 976 A.2d at 882. Permitting corporations to sue their coconspirators would not only force courts to apportion blame between wrongdoers, but it would also ''diminish[ ] corporate boards' incentives to supervise their own agents.'' *Id.* at 889; *see also Shimrak*, 112 Nev. at 251, 912 P.2d at 825 (''[T]raditionally neither courts of law nor equity will interpose to grant relief to parties to an illegal agreement.'').

[Headnotes 16-19]

In assessing whether the *in pari delicto* doctrine applies to a derivative action against a corporation, we must first determine whether acts of a director or officer are imputed to the corporation and then address the elements of the *in pari delicto* defense. Under basic corporate agency law, the actions of corporate agents are imputed to the corporation. *Strohecker v. Mut. B. & L. Assn.*, 55 Nev. 350, 355, 34 P.2d 1076, 1077 (1934). In *Strohecker*, we noted that

> A corporation can acquire knowledge or receive notice only through its officers and agents, and hence the rule holding a principal, in case of a natural person, bound by notice to his agent is particularly applicable to corporations, the general rule being that the corporation is affected with constructive knowledge, regardless of its actual knowledge, of all the material facts of which its officer or agent receives notice or acquires knowledge while acting in the course of his employment and within the scope of his authority, and the corporation is charged with such knowledge even though the officer or agent does not in fact communicate his knowledge to the corporation.

Id. (internal quotations omitted). The rationale for imputing an agent's acts to the corporation is to encourage corporate managers to carefully select and monitor those who are acting on the corporation's behalf. *In re American Intern. Group, Inc.*, 965 A.2d at 825 n.237. However, if an agent is acting on his own behalf, the agent's acts will not be imputed to the corporation. *Keyworth v. Nevada Packard Co.*, 43 Nev. 428, 439, 186 P. 1110, 1113 (1920). This exception is known as the ''adverse interest'' exception and, although we recognized the exception in *Keyworth*, we have not previously set forth its proper application. We do so now.

[Headnotes 20-23]

We now hold that the agent's actions must be completely and totally adverse to the corporation to invoke the exception. *See*

Kirschner v. KPMG LLP, 938 N.E.2d 941, 952 (N.Y. 2010). Requiring total abandonment of the corporation's interest renders the exception very narrow. ''This rule avoids ambiguity where there is a benefit to both the insider and the corporation, and reserves this most narrow of exceptions for those cases—outright theft or looting or embezzlement—where the insider's misconduct benefits only himself or a third party.'' *Id*. If the agent's wrongdoing benefits the corporation in any way, the exception does not apply. *Id*. (''Where the agent is perpetrating a fraud that will benefit his principal, th[e] rationale [of not imputing the agent's acts] does not make sense.''); *see also American Intern. Group*, 965 A.2d at 824 (holding that the adverse interest exception only applies when the agent acts completely for his own purpose). Simply because an agent has a conflict of interest or is acting mostly for his own self-interest will not invoke the exception. *American Intern. Group*, 965 A.2d at 824.[5]

[Headnote 24]

We also recognize a limited exception to the adverse interest exception whereby an agent's actions are imputed to the corporation even if the agent totally abandons the corporation's interest. Pursuant to the ''sole actor'' rule, the adverse interest exception will not preclude imputation if the agent is the sole agent or sole shareholder of a corporation. *In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997); *Lafferty*, 267 F.3d at 359 (''The general principle of the 'sole actor' exception provides that, if an agent is the sole representative of a principal, then that agent's fraudulent conduct is imputable to the principal regardless of whether the agent's conduct was adverse to the principal's interests.''). The rule also applies when there are multiple owners and managers who are each engaged in fraud against the corporation. *In re CBI Holding Co., Inc.*, 311 B.R. 350, 373 (S.D.N.Y. 2004), *reversed in part on other grounds by In re CBI Holding Co., Inc.*, 529 F.3d 432, 438 (2d Cir. 2008). Pursuant to this rule, an agent's knowledge is imputed to the corporation because the ''principal and agent are one and the same.'' *In re Mediators, Inc.*, 105 F.3d at 827.

[Headnote 25]

In applying the sole-actor rule, other courts have considered the presence of innocent decision-makers. Some have determined that

[5]At least one court has concluded that the adverse interest exception is either an exception to the general rule of imputation or an exception to the *in pari delicto* defense because the outcome is the same in either case. *American Intern. Group, Consol. Deriv. Lit.*, 976 A.2d 872, 891 n.50 (Del. Ch. 2009). While we recognize that the distinction may indeed be irrelevant, we conclude that the appropriate analysis requires courts to consider the adverse interest exception as a means of rebutting the presumption that an agent's acts are imputed to the corporation. Imputation is the first step in analyzing whether a defendant has an *in pari delicto* defense.

the existence of innocent decision-makers is irrelevant, *Baena v. KPMG LLP*, 453 F.3d 1, 8-9 (1st Cir. 2006), while others examine the amount of authority bestowed on the corporate agent, *Breeden v. Kirkpatrick & Lockhart, LLP*, 268 B.R. 704, 709-10 (S.D.N.Y. 2001). Still others look to the control the innocent decision-maker had to thwart the fraud, concluding that when an innocent party had the power to stop the wrongdoing, the corporation and the agency are not one and the same. *In re 1031 Tax Group, LLC*, 420 B.R. 178, 202-03 (Bankr. S.D.N.Y 2009); *CBI Holding Co.*, 311 B.R. at 373. Because the sole-actor rule operates to impute conduct otherwise subject to the adverse interest exception when the corporation and its agent are indistinguishable from each other, we conclude that the presence of innocent decision-makers is only relevant to assess whether there is indeed a sole actor. If some corporate decision-makers are unaware of wrongdoing then there exists no unity between the agent and the corporation such that the agent's complete adversity will impute to the corporation.

Application of the in pari delicto doctrine in the instant case

[Headnote 26]

In evaluating the pleadings in this case to determine whether the actions of AMERCO's officers are imputed to AMERCO, we ''recognize all factual allegations in [the] complaint as true and draw all inferences in [the plaintiff's] favor.'' *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Applying basic corporate agency law, the respondents' actions are imputed to AMERCO unless the adverse interest exception applies. However, the plaintiffs did not allege that any respondent totally abandoned AMERCO's interests. Instead, they allege that respondent AMERCO's officers and directors initiated and participated in a variety of actions that clearly benefited them. But the corporation was not completely harmed by the transactions, as it acquired a management interest in the self-storage facilities, and the corporation retained a fee for its role in the operation of those facilities. Furthermore, it is not alleged that the respondent officers and directors acted solely for their own benefit. In light of our narrow construction of the adverse interest exception, we conclude that these allegations show less-than-total abandonment of AMERCO's interests. Because the adverse interest exception does not apply, we need not address the sole-actor rule.

[Headnote 27]

Having determined that the acts of AMERCO's agents are imputed to AMERCO does not end our inquiry into the *in pari delicto* defense. To assess whether the *in pari delicto* defense precludes a derivative suit here requires application of the factors set

forth in *Shimrak*, 112 Nev. at 252, 912 P.2d at 826. In that case, we noted that

> ''the courts should not be so enamored with the latin phrase 'in pari delicto' that they blindly extend the rule to every case where illegality appears somewhere in the transaction. The fundamental purpose of the rule must always be kept in mind, and the realities of the situation must be considered. Where, by applying the rule, [1] the public cannot be protected because the transaction has been completed, [2] where no serious moral turpitude is involved, [3] where the defendant is the one guilty of the greatest moral fault, and [4] where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied.''

Shimrak, 112 Nev. at 252, 912 P.2d at 826 (alterations in original) (quoting *Magill*, 74 Nev. at 386, 333 P.2d at 719). Other courts have similarly noted that there are public policy grounds for not applying *in pari delicto* as a bar to an action among wrongdoers. *See Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) (holding that, in the context of a federal securities law, public policy must be considered before allowing an *in pari delicto* defense); *American Intern. Group*, 976 A.2d at 883. We determine that whether the defense of *in pari delicto* should apply here is an issue for the district court to decide following necessary discovery and briefing that properly evaluates the factors to be considered for the defense. Thus, we remand this matter to the district court for further proceedings.

Respondents' arguments regarding alternative grounds for affirmance

Although the district court dismissed appellants' amended complaint based solely on the *Goldwasser* settlement and its determination that appellants could not pursue claims against the SAC entities, respondents also argued other grounds for dismissing appellants' amended complaint, which they now offer on appeal as alternate rationales for affirming the district court's order. Since these alternate grounds were raised in the district court below, we have elected to address these issues on appeal. *See Nevada Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999).[6]

[6]On appeal, respondents also claim that dismissal is proper because the AMERCO shareholders ratified the SAC transactions. Ratification was the subject of a motion to dismiss in 2007, but the district court denied it because there were genuine issues of material fact regarding the sufficiency of the disclosure regarding those transactions. The district court did not again consider this ratification defense. However, respondents now request that we take judicial notice of public filings filed in 2008, after the district court's latest dis-

Appellants adequately pleaded demand futility

In 2003, the district court granted respondents' motion to dismiss on the ground that appellants had not adequately pleaded demand futility pursuant to NRCP 23.1. *See Shoen v. SAC Holding Corp.*, 122 Nev. 621, 631, 137 P.3d 1171, 1178 (2006). On appeal, we clarified the requirements for pleading demand futility and reversed and remanded the matter to the district court. *Id.* at 644-45, 137 P.3d at 1186-87. Appellants filed an amended complaint, and nominal defendant AMERCO filed a motion to dismiss, arguing that appellants still had not met NRCP 23.1's pleading requirements. In denying the motion, the district court determined that appellants ''satisfied the heightened pleading requirements of demand futility by showing a majority of the members of the AMERCO Board of Directors were interested parties in the SAC transactions.''

Respondents argue that the district court applied the wrong demand futility test and, thus, an alternate ground upon which we should affirm the district court's subsequent order granting the motions to dismiss is that appellants failed to meet the pleading requirements set forth in *Shoen*. We disagree.

[Headnote 28]

Persons filing shareholder derivative suits face a heightened pleading requirement pursuant to NRCP 23.1. *Shoen*, 122 Nev. at 633, 137 P.3d at 1179. NRCP 23.1 requires shareholders to ''state, with particularity, the demand for corrective action that the shareholder made on the board of directors . . . and why he failed to obtain such action, *or* his reasons for not making a demand.'' *Id.* at 633-34, 137 P.3d at 1179 (emphasis added). Failure to satisfy the heightened pleading requirement ''justifies dismissal of the complaint for failure to state a claim upon which relief may be granted.'' *Id.* at 634, 137 P.3d at 1180.

[Headnote 29]

To determine whether demand upon the board is excused, we apply standards articulated by the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805, 814 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000); and *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993). *See Shoen*, 122 Nev. at 644, 137 P.3d at 1186. The *Aronson* test applies ''[w]hen the alleged wrongs constitute a business decision by the board of directors.'' *Shoen*, 122 Nev. at 636, 137 P.3d at 1181

missal order, which they claim cure the earlier factual issues. We decline to consider this ratification issue as it was not properly before the district court, and we decline to address an issue raised for the first time on appeal. *See Mainor v. Nault*, 120 Nev. 750, 770 n.42, 101 P.3d 308, 321 n.42 (2004).

(emphasis omitted). The *Rales* test, on the other hand, is the appropriate ''demand futility analysis for when the board considering a demand is not implicated in a challenged business transaction.'' *Shoen*, 122 Nev. at 638-39, 137 P.3d at 1183. As we previously recognized, appellants in this case ''do not challenge any board-considered business decision. Therefore, the *Rales* test applies.'' *Id*. at 641, 137 P.3d at 1184-85.

[Headnotes 30-33]

Under the *Rales* test, we evaluate whether particularized facts in the shareholder derivative complaint ''raise[ ] a reasonable doubt that the current board of directors would be able to exercise its independent and disinterested business judgment in responding to a demand.'' *Id*. at 642, 137 P.3d at 1185. Directors' impartiality can be shown through allegations demonstrating ''that the majority is 'beholden to' directors who would be liable.'' *Id*. at 639, 137 P.3d at 1183 (quoting *Rales*, 634 A.2d at 936). Additionally, director interestedness can be demonstrated through alleged facts indicating that ''a majority of the board members would be 'materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.' '' *Id*. (alteration in original) (quoting *Seminaris v. Landa*, 662 A.2d 1350, 1354 (Del. Ch. 1995)). A shareholder's ''[a]llegations of mere threats of liability through approval of the wrongdoing or other participation'' is not enough to satisfy the demand futility pleading requirements. *Id*. at 639-40, 137 P.3d at 1183.

At the time that appellants filed their shareholder derivative suit, eight persons composed AMERCO's board of directors: Joe, James, Bayer, Carty, Dodds, Brogan, Grogan, and M. Frank Lyons.[7] We previously determined that ''it is clear that [Joe and James] are interested for demand futility purposes.'' *Id*. at 643 n.65, 137 P.3d at 1185 n.65. Consequently, now we must evaluate whether appellants have adequately alleged that at least two additional directors lack independence and impartiality. *See Beneville v. York*, 769 A.2d 80, 86 (Del. Ch. 2000) (holding that demand is not required when half of the members of an even-numbered board are interested).

Additional directors are allegedly interested and lack independence

[Headnotes 34]

We conclude that appellants adequately alleged that three other directors—Bayer, Carty, and Dodds—lack disinterestedness and

[7]Lyons is not a party to this case.

independence.[8] In the amended complaint, appellants alleged that when Bayer served as the president of AMERCO's real estate subsidiary AREC, he gave approval for the sale of approximately 100 properties to the SAC entities at unfair prices. Also as AREC's president, appellants alleged that Bayer ''used AREC's human resources and offices to help Mark Shoen and the SAC entities locate, obtain and develop valuable self-storage properties without compensation, without disclosing these arrangements to AMERCO's stockholders.'' Moreover, appellants alleged that Bayer was a director of another AMERCO subsidiary, and he ''approved over $100 million in non-recourse loans'' from that subsidiary to the SAC entities, which were then used to purchase the properties from AREC. Appellants further asserted that Bayer ''knowingly signed incomplete and misleading annual reports'' that ''concealed the nature and scope of AMERCO's dealings with the SAC [e]ntities.''

[Headnote 35]

With regard to Carty and Dodds, appellants alleged in their amended complaint that while acting as directors of U-Haul, the two board members authorized millions of dollars in nonrecourse loans to the SAC entities, and, in their roles as directors of AREC, they consented to the sale of hundreds of properties to the SAC entities. Additionally, appellants alleged that, like Bayer, Carty and Dodds signed false annual AMERCO reports.

Appellants further alleged that Carty is not impartial because he is Joe and Mark's uncle, even becoming like a ''father figure'' to them. *See Harbor Finance Partners v. Huizenga*, 751 A.2d 879, 889 (Del. Ch. 1999) (stating that ''[c]lose familial relationships between directors can create a reasonable doubt as to impartiality''). Appellants also contended that Carty ''repeatedly encouraged [Joe, James, and Mark] to 'funnel' money out of AMERCO on a pre-tax basis.'' Throughout the family feud for control over AMERCO, appellants alleged, Carty consistently aligned himself with Joe and Mark. In fact, according to appellants, Joe placed Carty back on the AMERCO board of directors after a different Shoen brother had fired him.

[Headnote 36]

Regarding Dodds, appellants further alleged that he has a ''close, bias-producing relationship with [Joe Shoen].'' According

[8]Our dissenting colleague acknowledges that the parties do not address whether demand futility should be assessed based on the composition of the board in place in 2002 when the original complaint was filed, or in 2006 when the amended complaint was filed, citing *Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006). However, the parties did not address this issue, and we will not discuss an issue not raised on appeal. *See* NRAP 28; *see also Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 444 n.5 (2006).

to appellants, Dodds fervently supported Joe during the Shoen family feud and, when Joe attempted to take over AMERCO by issuing stock to trustworthy employees who then allowed him to vote their shares, he selected Dodds as one of the employees to purchase stock. However, appellants alleged, Dodds could not afford to purchase the stock, so Joe and the AMERCO board loaned him the money.

[Headnote 37]

Further allegations in the amended complaint included that Joe, James, and Mark ''dominate and control the AMERCO Board'' and that they have ''pack[ed] the AMERCO Board with loyal subordinates.'' Appellants also alleged that Joe, James, and Mark were in a position to manipulate Bayer, Carty, and Dodds because the former group of men have the power to fire the latter group and discontinue their salaries and pension benefits. Appellants contended that in the past, Joe retaliated against directors that took positions adverse to his.

[Headnote 38]

In accepting appellants' allegations as true, *see Shoen*, 122 Nev. at 635, 137 P.3d at 1180, it appears that Joe and James have considerable influence over Bayer, Carty, and Dodds, raising reasonable doubts as to their ability to exercise independent and disinterested business judgment in responding to a demand. Construing the amended complaint liberally with all fair inferences made in favor of appellants, *see id.*, we conclude that appellants have alleged sufficient facts demonstrating that demand upon the board would have been futile, as at least five directors were interested or lacked impartiality—James, Joe, Bayer, Carty, and Dodds.[9]

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[9]Respondents request this court to take judicial notice of a bankruptcy court's findings ''that 'the appointment [of AMERCO's officers and directors] is consistent with the interests of the creditors and the equity security holder[s] and with public policy.' '' Respondents argue that this finding demonstrates the independence of the AMERCO board of directors. Respondents also contend that the bankruptcy court addressed the fairness of the SAC transactions.

We may take judicial notice of facts that are ''[g]enerally known within the territorial jurisdiction of the trial court,'' as well as those that are ''[c]apable of accurate and ready determination . . . [and] not subject to reasonable dispute.'' NRS 47.130(2). Several courts have concluded that ''[a] court may take judicial notice of a document filed in another court 'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.' '' *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (quoting *Kramer v. Time Warner Inc.*, 937 F.2d 767, 774 (2d Cir. 1991)); *accord Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir. 2001); *Southern Cross Overseas v. Wah Kwong Shipping*, 181 F.3d 410, 426 (3d Cir. 1999). However, generally, this court will not take judicial notice of facts in a different case, even if connected in some way, unless the party seeking such notice demonstrates a valid reason for doing so. *Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009)

In *Shoen*, we noted that ''[i]f the district court should find the pleadings provide sufficient particularized facts to show demand futility, it must later conduct an evidentiary hearing to determine, as a matter of law, whether the demand requirement nevertheless deprives the shareholder of his or her standing to sue.'' *Id.* at 645, 137 P.3d at 1187. Thus, on remand, this matter should be scheduled for an evidentiary hearing to determine whether demand was, in fact, futile.[10]

Some of appellants' causes of action were pleaded sufficiently

[Headnote 39]

Respondents contend that an additional alternate ground upon which this court should affirm the district court's order is that appellants failed to state claims upon which relief can be granted. The claims against all of the respondents are: (1) engaging in

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(holding that this court will generally not take judicial notice of records in other matters); *Carson Ready Mix v. First Nat'l Bk.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (providing that this court will not consider evidence not appearing in the record on appeal); *Occhiuto v. Occhiuto*, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (recognizing general rule but holding that the close relationship between the case and a previous divorce proceeding justified the district court taking judicial notice of the prior proceeding). We conclude that the bankruptcy court's alleged findings that the AMERCO board was independent and that the SAC transactions were fair are not appropriate matters of which this court may take judicial notice.

Our dissenting colleague points to the bankruptcy court's findings in the context of analyzing demand futility. However, the dissent overlooks a provision in the bankruptcy plan that expressly allowed appellants' derivative claims to proceed after the plan was approved:

> Notwithstanding anything in this Plan to the contrary, the Confirmation of this Plan shall not (i) enjoin, impact or affect the prosecution of the Derivative Actions . . . .

''Derivative Actions,'' as defined by the reorganization plan, specifically include the matters that resulted in this appeal. As a consequence, it is clear that the bankruptcy court order provides no basis for resolving whether the directors were interested for purposes of demand futility.

[10]Respondents contend that this court should affirm the district court's order because appellants have not overcome the presumption that respondents acted in good faith. Pursuant to Nevada's business judgment rule set forth in NRS 78.138, directors and officers benefit from the ''presumption that in making a business decision [they] . . . acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.'' *Shoen*, 122 Nev. at 632, 137 P.3d at 1178-79 (quoting *Aronson*, 473 A.2d at 812). However, the business judgment rule cannot be invoked by directors, where, as alleged here, they were not asked to consider the issue, *Aronson*, 473 A.2d at 812, nor can respondents rely on the business judgment rule as to directors Bayer, Carty, and Dodds when the board was not asked to consider the SAC entity transactions. *Id.* at 816. Thus, we determine that the business judgment rule does not provide this court an alternative ground upon which to affirm the district court's dismissal.

ultra vires acts, (2) wrongful interference with AMERCO's prospective economic advantage, and (3) abuse of control.[11] The appellants also claimed: (1) breach of the fiduciary duty of loyalty by engaging in self-dealing against all of the former directors, (2) aiding and abetting a breach of the fiduciary duty of loyalty against the SAC entities, (3) usurpation of corporate opportunities against Mark, and (4) unjust enrichment against the SAC entities.

Before addressing each cause of action, we necessarily note that appellants' claims are subject to different pleading standards. Pursuant to NRS 78.138(7), to show that a director breached his or her fiduciary duty, a shareholder must prove that the director's ''act or failure to act constituted a breach of his or her fiduciary duties'' and that the ''breach of those duties involved intentional misconduct, fraud or a knowing violation of the law.'' NRCP 9(b) provides, in pertinent part, that ''[i]n all averments of fraud[,] . . . the circumstances constituting fraud . . . shall be stated with particularity.'' Because appellants' claims of breach of the fiduciary duty are, in this instance, allegations of fraud committed by respondent officers and directors, for those causes of action, appellants must satisfy the heightened pleading requirement of NRCP 9(b). For all other causes of action, appellants need only satisfy the more liberal pleading requirements of NRCP 8(a) (''a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief'').

Breach of fiduciary duty of loyalty/usurpation of corporate opportunities

[Headnote 40]

Appellants' first and second causes of action in the amended complaint contained allegations that respondents breached the fiduciary duty of loyalty by self-dealing and usurping corporate opportunities, and, with regard to the SAC entities, aiding and abetting a breach of fiduciary duty. ''[T]he duty of loyalty requires the board and its directors to maintain, in good faith, the corporation's and its shareholders' best interests over anyone else's interests.'' *Shoen*, 122 Nev. at 632, 137 P.3d at 1178. As noted, to hold ''a

[11]Nevada does not recognize a cause of action for abuse of control, and in the cases to which appellants cite, claims for abuse of control are essentially claims for breach of the fiduciary duty of loyalty. *See Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983) (stating that directors owe ''shareholders an uncompromising duty of loyalty''); *see also Jones v. H.F. Ahmanson & Company*, 460 P.2d 464, 471 (Cal. 1969) (acknowledging that majority shareholders ''have a fiduciary responsibility to the minority and to the corporation''). Accordingly, we conclude that appellants' claim of abuse of control is duplicative of their claim of breach of the fiduciary duty of loyalty and need not be separately addressed.

director or officer . . . individually liable,'' the shareholder must prove that the director's breach of his or her fiduciary duty of loyalty ''involved intentional misconduct, fraud or a knowing violation of law.'' NRS 78.138(7)(b); *see also Shoen*, 122 Nev. at 640, 137 P.3d at 1184. Appellants' allegations can be divided into four groups of defendants.

Mark Shoen

[Headnote 41]

In the amended complaint, appellants first alleged that Mark, one of AMERCO's executive officers, was materially self-interested in the transfer of AMERCO assets and opportunities to the SAC entities due to his ownership and control of the SAC entities. Appellants contended that Mark breached his fiduciary duty of loyalty, placing his own interests above those of AMERCO, when he caused AMERCO to sell property to SAC entities at below-market prices and usurped corporate opportunities that he had learned about as an officer of AMERCO, ''by causing the SAC [e]ntities . . . to buy [self-storage] properties'' despite his knowledge that AMERCO would have been interested in the properties and without obtaining disinterested director approval. Considering the accusations to be true, we determine that appellants have set forth claims upon which relief can be granted, based on a breach of the fiduciary duty of loyalty by Mark.

Joe and James Shoen

[Headnote 42]

Appellants further alleged in the first cause of action in the amended complaint that Joe and James retained an undisclosed pecuniary interest in the SAC entities and that their self-interest in the SAC transactions was increased through their familial ties to Mark. However, appellants offered no explanation as to why or how Joe and James personally benefited from the diversion of AMERCO's assets to a company owned by Mark, other than to suggest that the sale of their SAC-entity shares to Mark was below-market, which infers that they secretly retained an interest in the entities. We conclude that merely alleging that Joe and James benefited because they had an interest in aiding their brother and might have a continued pecuniary interest of some sort fails to meet the heightened pleading standard in NRCP 9(b). Thus, respondents are correct that the claim in the first cause of action in the amended complaint was properly dismissed as to Joe and James, albeit for incorrect reasons. *See LVCVA v. Secretary of State*, 124 Nev. 669, 689 n.58, 191 P.3d 1138, 1151 n.58 (2008) (''[W]e will affirm the dis-

trict court if it reaches the right result, even when it does so for the wrong reason.'').

Bayer, Carty, Dodds, Herrera, Johnson, Brogan, and Grogan

[Headnote 43]

Appellants alleged that Bayer, Carty, Dodds, Herrera, Johnson, Brogan, and Grogan breached their duty of loyalty ''by knowingly orchestrating, participating, facilitating and aiding and abetting the self-dealing transactions.'' In particular, appellants alleged that these respondents ''knowingly signed misleading and incomplete public filings'' that failed to include the details of the SAC transactions. Appellants contended that Bayer, Carty, Dodds, Herrera, Johnson, Brogan, and Grogan knew the filings were false because, as members of the boards of various AMERCO subsidiaries, they approved loans to the SAC entities and were aware of the details of the transactions. However, simply alleging that the public filings did not contain enough information about the SAC entities does not demonstrate that respondents engaged in intentional misconduct or fraud. Given the statutory requirements of NRCP 9(b), we determine that appellants' claim in the first cause of action in the amended complaint of a breach of the fiduciary duty of loyalty by Bayer, Carty, Dodds, Herrera, Johnson, Brogan, and Grogan was not pleaded with sufficient particularity and was correctly dismissed.

The SAC entities

[Headnotes 44, 45]

The SAC entities allegedly aided and abetted the other respondents' breaches of fiduciary duty. Although we have not previously recognized a claim for aiding and abetting the breach of a fiduciary duty, we take this opportunity to do so. We adopt the standard applied by Delaware courts, which requires that four elements be shown: (1) a fiduciary relationship exists, (2) the fiduciary breached the fiduciary relationship, (3) the third party knowingly participated in the breach, and (4) the breach of the fiduciary relationship resulted in damages. *Malpiede v. Townson*, 780 A.2d 1075, 1096 (Del. 2001).

The extent of appellants' allegation was that ''[t]he SAC [e]ntities (acting through Defendant [Mark Shoen]) knowingly participated in the breaches of fiduciary duties by facilitating the transfer of AMERCO's assets at below-market prices.'' However, because Mark owns and controls the SAC entities, we conclude that appellants have sufficiently satisfied the elements enunciated in

Malpiede. Thus the appellants' claim against the SAC entities for aiding and abetting respondents' breach of the fiduciary duty of loyalty was improperly dismissed.

Appellants failed to adequately plead a cause of action for ultra vires acts

[Headnotes 46, 47]

Appellants' third cause of action pleaded in their amended complaint was based on respondents engaging in ultra vires acts. We previously stated that ''a corporate act is said to be ultra vires when it goes beyond the powers allowed by state law or the [corporation's] articles of incorporation.'' *Shoen*, 122 Nev. at 643, 137 P.3d at 1185. However, '' '[i]f . . . the [corporation's] act was within the corporate powers, but was performed without authority or in an unauthorized manner, the act is not ultra vires.' '' *Id*. at 643, 137 P.3d at 1186 (alterations in original) (quoting *Sammis v. Stafford*, 56 Cal. Rptr. 2d 589, 593 (Ct. App. 1996)).

In the amended complaint, appellants alleged that AMERCO acted in violation of its articles of incorporation when it transacted business with the SAC entities without obtaining shareholder approval prior to consummating the transactions. Because AMERCO's articles of incorporation permit such actions as long as shareholder approval is obtained, such actions were ''unauthorized'' but not ultra vires. Appellants failed to demonstrate otherwise. Thus, we conclude that appellants' cause of action for ultra vires acts must be dismissed.

Wrongful interference with prospective economic advantage

[Headnote 48]

Appellants next allege wrongful interference with prospective economic advantage, against all respondents. Interference with prospective economic advantage requires appellants to demonstrate the following five factors:

> (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct.

Wichinsky v. Mosa, 109 Nev. 84, 87-88, 847 P.2d 727, 729-30 (1993).

In their amended complaint, appellants alleged that ''AMERCO had prospective economic or contractual relationships with cus-

tomers who would have rented self-storage units in U-Haul facilities,'' as well as ''with third parties who owned and sold properties which could be used as self-storage locations.'' Appellants further alleged that respondents were aware of these prospective economic relationships and ''acted for the benefit of the SAC [e]ntities, with the intent to harm AMERCO.'' Also, appellants pointed to the sale of AMERCO properties to the SAC entities at allegedly unfairly low prices, which prevented AMERCO from realizing the amount of profit it would have obtained from selling to outsiders. Finally, appellants alleged that AMERCO and its shareholders have suffered irreparable harm as a result.

[Headnote 49]

Unlike the claims of breach of fiduciary duty, appellants' claim for wrongful interference with prospective economic advantage is not based on fraud; thus, it is not subject to the heightened pleading requirement in NRCP 9(b). Accepting as true each of the appellants' particularized factual allegations and drawing every fair inference in their favor, appellants satisfied the general pleading requirement of NRCP 8(a).[12] Therefore, we determine that appellants have set forth a claim in the fourth cause of action of the amended complaint of wrongful interference with prospective economic advantages upon which relief could be granted.

Unjust enrichment

[Headnotes 50, 51]

Appellants' next cause of action is for unjust enrichment against the SAC entities. ''Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another.'' *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 363 n.2, 741 P.2d 802, 804 n.2 (1987).

Appellants alleged in the amended complaint that ''the SAC [e]ntities have received, and they retain, money and property of AMERCO.'' The SAC entities allegedly accomplished this through transactions that they entered into with AMERCO. Under the more liberal pleading requirements of NRCP 8(a), we conclude that appellants' unjust enrichment claim was pleaded sufficiently.

[12]Our dissenting colleague argues that because we dismissed the breach of fiduciary duty claims against the directors, we must also dismiss the wrongful interference claims. In reaching this conclusion, the dissenting justice contends that a wrongful interference claim fails if the plaintiff does not present sufficient evidence that the director's actions overcome the business judgment presumption. While we do not dismiss this analysis, the parties did not brief this argument on appeal, and it is thus not properly before this court. *See* NRAP 28; *see also Bongiovi v. Sullivan*, 122 Nev. 556, 569 n.5, 138 P.3d 433, 444 n.5 (2006).

Whether appellants' claims are barred by the statute of limitations

[Headnote 52]

The final ground upon which respondents urge this court to affirm the district court's order is that the statute of limitations for appellants' claims has expired. If the allegations contained in the amended complaint demonstrate that the statute of limitations has run, then dismissal upon the pleadings is appropriate. *See Shupe & Yost, Inc. v. Fallon Nat'l Bank*, 109 Nev. 99, 100, 847 P.2d 720, 720 (1993).

[Headnotes 53-56]

Appellants' initial two causes of action alleged a breach of the fiduciary duty. A breach of fiduciary duty is analogous to fraud, and thus, Nevada applies the three-year statute of limitation set forth in NRS 11.190(3)(d). *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 799, 801 P.2d 1377, 1382 (1990). The statute of limitations for a claim for breach of fiduciary duty does not begin ''to run until the aggrieved party knew, or reasonably should have known, of the facts giving rise to the breach.'' *Id*. at 800, 801 P.2d at 1382. When a fiduciary ''fails to fulfill his obligations'' and keeps that failure hidden, the statute of limitations will not begin to run until the failure of the fiduciary is ''discovered, or should have been discovered, by the injured party.'' *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 48-49, 589 P.2d 173, 175 (1979). ''Mere disclosure of a transaction by a director, without disclosure of the circumstances surrounding the transaction, is not sufficient, as a matter of law, to commence the running of the statute.'' *Id*. at 48, 589 P.2d at 175.

Appellants' claim for wrongful interference with prospective economic advantage is subject to a four-year statute of limitations. *See* NRS 11.190(2)(c); *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 781 (9th Cir. 2002) (applying Nevada law and concluding that a claim for ''intentional interference with prospective business relations [is] subject to Nevada's four-year limitations period''). The statute of limitation for an unjust enrichment claim is four years. NRS 11.190(2)(c).

[Headnote 57]

A determination of '' '[w]hen the plaintiff knew or in the exercise of proper diligence should have known of the facts constituting the elements of his cause of action is a question of fact for the trier of fact.' '' *Nevada State Bank*, 106 Nev. at 800, 801 P.2d at 1382 (quoting *Oak Grove Inv. v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 89 P.3d 31 (2004)). Because, here, the pleadings are suffi-

cient to create a question of fact regarding whether the statute of limitations had run, and the district court never reached this issue, we conclude that the question of whether the statute of limitations has run against all of appellants' viable claims must be considered on remand.[13]

CONCLUSION

In conclusion, the *Goldwasser* settlement did not release claims that arose after the agreement because the claim release clause only released those claims that existed at the time of the settlement. Additionally, while the acts of AMERCO's agents are imputed to AMERCO, the *in pari delicto* defense may not preclude appellants from bringing claims against respondents. We remand to the district court to examine the factors in *Shimrak* and determine whether the *in pari delicto* defense applies. We also remand to the district court to conduct an evidentiary hearing to determine whether demand was futile.

As to the alternative grounds for affirming the district court, we affirm in part and reverse in part. As to Mark, we conclude that the appellants sufficiently pleaded a breach of the fiduciary duty of loyalty, usurpation of corporate opportunities, and wrongful interference with prospective economic advantage. Appellants also sufficiently pleaded breach of the fiduciary duty of loyalty for aiding and abetting a breach, wrongful interference with prospective economic advantage, and unjust enrichment against the SAC entities. As to the other respondents, appellants sufficiently pleaded wrongful interference with prospective economic advantage. Therefore, we reverse the district court's dismissal of these claims. As to all other claims, we conclude that appellants did not sufficiently plead them and the district court correctly dismissed them.

Accordingly, we affirm in part and reverse in part the district court's order and remand this matter for proceedings consistent with this opinion.

DOUGLAS, C.J., and CHERRY, SAITTA, GIBBONS, and PARRAGUIRRE, JJ., concur.

PICKERING, J., concurring in part and dissenting in part:

In *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 137 P.3d 1171 (2006) (*Shoen I*), this court reversed an order dismissing this case for not adequately pleading demand futility and remanded with

[13]Appellants request that this court reassign the matter to a different judge upon remand, arguing that ''Judge Adams' successive dismissals demonstrate that he has prejudged this case.'' However, appellants fail to cite any basis for disqualification under the Nevada Code of Judicial Conduct, and thus, we conclude that reassignment is not warranted.

specific instructions: (1) to the plaintiffs to file an amended complaint; and (2) to the district court to decide whether, under *Shoen I*, the amended complaint adequately pleaded demand futility. Now the case returns, this time on an order dismissing the claims in the amended complaint as precluded by the *Goldwasser* settlement and the *in pari delicto* doctrine. I agree with the majority that neither the *Goldwasser* settlement nor the *in pari delicto* doctrine precludes this suit at the pleading stage as a matter of law. I also agree with its NRCP 12(b)(5) dismissal of certain claims for relief and with its direction to the district court to conduct further proceedings with respect to demand futility. However, I write separately to address the claims remaining in the case and the scope of the proceedings on remand with respect to demand futility and related issues.

1. *Dismissal of the wrongful interference claims*

The majority dismisses under NRCP 9(b) and NRCP 12(b)(5) all of the claims asserted against the individual directors except the wrongful interference with prospective economic advantage claim. I would go further and dismiss the wrongful interference claim as well. ''It is hornbook law that the actions complained of in a claim for intentional interference with prospective advantage must be wrongful.'' *Panter v. Marshall Fields & Co.*, 646 F.2d 271, 298 (7th Cir. 1981). Indeed, the very name of the tort is ''*wrongful* interference with prospective economic advantage.'' *Leavitt v. Leisure Sports, Inc.*, 103 Nev. 81, 88, 734 P.2d 1221, 1225-26 (1987). The ''wrongfulness'' alleged in the amended complaint to sustain this claim against the individual directors derives entirely from their alleged breaches of fiduciary duty in connection with the SAC transactions. If, as the majority concludes, the amended complaint fails to plead sufficient facts to overcome the presumption of the business judgment rule as to the breach of fiduciary duty claims—appropriately, given the broadly exculpatory provisions in AMERCO's organizational documents, *see Wood v. Baum*, 953 A.2d 136, 140-41 (Del. 2008); *see also* NRS 78.138(7)—the wrongful interference claims also fail. *Cf. Panter*, 646 F.2d at 299 (''In the absence of sufficient evidence that the directors acted improperly to overcome the presumption of the business judgment rule, a case cannot proceed to the jury on an interference with prospective economic opportunity theory.'').

2. *Proceedings on remand*

I cannot agree with the majority that the amended complaint adequately alleges demand futility and would instead remand with instructions to the district court to conduct the analysis ordered in

Shoen I.[1] In my opinion, it is imprudent for this court to conduct that analysis in the first instance under the unique circumstances presented here.

''Demand futility analysis is conducted on a claim-by-claim basis.'' *Beam ex rel. M. Stewart Living v. Stewart*, 833 A.2d 961, 977 n.48 (Del. Ch. 2003). The dismissal of most, if not all, of the claims against the individual directors has a large potential impact on the demand futility analysis. The briefing that was done on demand futility was filed in the district court in 2006 and 2007 and in this court in 2009. Although not addressed by the parties, it is not even clear whether, given the dismissal and subsequent amendment in 2006 of the complaint, demand futility should be assessed as of 2002, when the original complaint was filed, or 2006, when the amended complaint was filed. *See Braddock v. Zimmerman*, 906 A.2d 776, 786 (Del. 2006) (''Where a complaint is amended with permission following a dismissal without prejudice, even if the act or transaction complained of in the amendment is essentially the same conduct that was challenged in the original dismissed complaint, the Rule 23.1 demand inquiry must be assessed by reference to the board in place at the time when the amended complaint is filed.'').

It appears from the amended complaint that this is a type of double-derivative suit,[2] where, to excuse demand, the complaint must allege facts that create ''a reasonable doubt that a majority of the Board would be disinterested or independent *in making a decision on a demand*.'' *Rales v. Blasband*, 634 A.2d 927, 930 (Del. 1993) (emphasis added). The focus in this type of case is not on ''the challenged transaction or the directors' interest in that transaction, but rather on the directors' interest in the decision about whether to sue.'' *Waber v. Dorman*, 2011 WL 814992, at *4 (N.D. Ill. Feb. 23, 2011) (applying Delaware law and discussing *Rales*).

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[1]The district court's determination that being named defendants in this suit makes the directors sufficiently ''interested'' as to excuse demand is clearly erroneous and contrary to the law of this case. *Shoen I*, 122 Nev. at 640, 137 P.3d at 1184 (''interestedness because of potential liability can be shown only in those rare cases . . . where defendants' actions were so egregious that a substantial likelihood of director liability exists'' (quotations omitted)). Particularly is this so given the dismissal of most, if not all, of the claims asserted in the amended complaint against the individual directors.

[2]The amended complaint alleges indirect injury to the parent, AMERCO, in which the plaintiffs have an interest, as a result of alleged direct injuries to its subsidiaries, AREC and U-Haul. Recent Delaware cases, on whose demand futility law we relied in *Shoen I*, holds that ''in a double derivative action involving a wholly owned subsidiary, a stockholder plaintiff only must plead demand futility (or otherwise satisfy Rule 23.1) at the parent level.'' *Hamilton Partners, L.P. v. England*, 11 A.3d 1180, 1207 (Del. Ch. 2010) (discussing *Lambrecht v. O'Neal*, 3 A.3d 277 (Del. 2010)).

''[I]t is a fundamental principle of corporate governance that the directors of a corporation and not its shareholders manage the business and affairs of the corporation.'' 13 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 5963, at 60 (West 2004). Among the matters entrusted to a corporation's directors is the decision to litigate—or not to litigate—a claim by the corporation against third parties. *Id.*; *In re Citigroup, Inc. Shareholder Derivative Litigation*, 964 A.2d 106, 120 (Del. Ch. 2009). Allowing a derivative suit to proceed without demand reallocates the authority to decide whether to sue from the board to the individual shareholder or shareholders who sue derivatively. To justify this reallocation of decision-making authority, a derivative action complaint must comply with NRCP 23.1 and ''allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort.'' While ''[p]laintiffs are entitled to all reasonable factual inferences that logically flow from the particularized facts alleged, . . . conclusory allegations are not considered as expressly pleaded facts or factual inferences.'' *Brehm v. Eisner*, 746 A.2d 244, 255 (Del. 2000).

Although *Shoen I* obviously did not address the yet-to-be-filed amended complaint, its suggestion that demand futility be determined under the test articulated in *Rales* remains appropriate. *Shoen I*, 122 Nev. at 641-42, 137 P.3d at 1185. ''*Rales* requires that a majority of the board be able to consider and appropriately to respond to a demand 'free of personal financial interest and improper extraneous influences.' Demand is excused as futile [only] if the Court finds that there is 'a reasonable doubt that a majority of the Board would be disinterested or independent in making a decision on demand.' '' *Beam*, 833 A.2d at 977 (quoting *Rales*, 634 A.2d at 930, 935). A director is not ''disinterested'' if ''he or she will receive a personal financial benefit from a transaction that is not equally shared by the shareholders'' or ''a corporate decision will have a materially detrimental impact on a director, but not on the corporation and the stockholders.'' *Rales*, 634 A.2d at 936. Lack of independence can be shown by alleging particular facts that support a reasonable inference that a director is so beholden to an interested party that his ''discretion would be sterilized.'' *Id.* While a close family relationship can disqualify a director—here, Joe Shoen and James Shoen, as to the derivative claims against their brother, Mark Shoen, 122 Nev. at 642 n.65, 137 P.3d at 1185 n.65—business, social, and more remote family relationships are not disqualifying, without more. *See Beam*, 833 A.2d at 981; 1 *Principles of Corp. Governance* § 1.26 (1994) (an uncle/nephew relationship does not establish the parties as members of one an-

other's immediate families, as child/parent or sibling relationships do).

The main claims that survive dismissal are those against Mark Shoen and the SAC entities. As to those claims, none of the directors except Joe Shoen and James Shoen appear disqualified by personal interest from fairly judging the suit demand. The issue that I would remand to the district court, therefore, is whether, as to those claims, the amended complaint pleads particularized facts sufficient to overcome the presumption that, in assessing that suit demand, the directors charged with doing so can be faithful to their fiduciary duties to AMERCO. *Beam*, 845 A.2d at 1048-49; *see In re Bear Stearns Companies, Inc.*, 763 F. Supp. 2d 423, 541 (S.D.N.Y. 2011) (applying Delaware law).

The surviving claims in the amended complaint, at their core, challenge the structural relationship between AMERCO, its subsidiaries, and the SAC special purpose entities. This structure and these relationships have been examined repeatedly, first by the United States District Court for the District of Arizona in *Goldwasser*, and more recently and much more comprehensively by the United States Bankruptcy Court for the District of Nevada in *In re: AMERCO*, No. BR-03-52103-GWZ (Bankr. D. Nev. 2004).[3] They have also, according to the briefs presented on appeal, been presented to and ratified by the company's shareholders.[4] The principal named plaintiff, Paul Shoen, served on the AMERCO board when some of the transactions he complains about in this derivative action occurred and, more importantly, when the business model the amended complaint challenges was set. While these facts do not establish claim or issue preclusion, they are significant, because they make it fair to expect considerably more particularity than the rote conclusory language from the demand futility caselaw that the amended complaint provides.

Given the unique and incontestable record facts, I would set the pleading bar higher than my colleagues do before subjecting this entity and its shareholders to derivative litigation. I am unconvinced that the conclusory, though prolix, allegations in the

[3]After plaintiffs filed the original complaint but before the amended complaint was filed, the United States Bankruptcy Court for the District of Nevada entered its 11 U.S.C. § 1129(a)(5) order in *In re AMERCO*, No. BR-03-52103-GWZ (Bankr. D. Nev. 2004), approving AMERCO's plan of reorganization. In this order, the Bankruptcy Court specifically found that the AMERCO board's composition ''is consistent with the interests of creditors and equity security holders and with public policy,'' including, presumably, the requirements of applicable state and federal corporate law, to include the independence requirements under the Sarbanes-Oxley Act of 2002, 15 U.S.C. § 7213, and the entity's listing stock exchange rules. *Id.*

[4]As the majority recognizes, this issue is potentially dispositive in this case but cannot be resolved by this court because it depends on the adequacy of disclosures not included in the record on appeal.

amended complaint clear that bar. There have been enough changes to the playing field, with the majority's dismissal of many claims in the amended complaint, AMERCO's reorganization, and the 2008 shareholder ratification, that I would remand for further briefing and argument on demand futility on the issues, among others, outlined above.

TIMOTHY LEE HOBBS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 54933

May 19, 2011 251 P.3d 177

Appeal from a judgment of conviction, pursuant to a jury verdict, of domestic battery and injury to other property. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Defendant, who was charged with felony domestic battery and injury to other property petitioned for habeas relief, claimed that the act of spitting in victim's face did not constitute a battery. The district court denied petition upon finding that the act of spitting on another could constitute a battery. Subsequently, defendant was convicted in a jury trial in the district court of felony domestic battery and injury to other property. Defendant appealed. The supreme court, SAITTA, J., held that: (1) the act of spitting on another constituted battery, but (2) State failed to establish requisite prior domestic battery misdemeanor convictions necessary to enhance domestic battery offense to a felony.

Affirmed in part, reversed in part, and remanded.

Gibson & Kuehn, LLP, and *Harold Kuehn*, Pahrump, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Brian Kunzi*, District Attorney, and *Wesley S. White*, Deputy District Attorney, Nye County, for Respondent.

1. ASSAULT AND BATTERY.
   Defendant's act of spitting in victim's face constituted the ''use of force or violence'' necessary to support conviction for domestic battery; at minimum under the domestic battery statute, a battery is the intentional and unwanted exertion of force upon another, however slight, and evidence showed that defendant intentionally spat on victim. NRS 200.481.
2. CRIMINAL LAW.
   Statutory interpretation is an issue of law subject to de novo review.
3. STATUTES.
   The supreme court's objective in construing a statute is to give effect to the Legislature's intent.

4. STATUTES.
   In construing a statute, the supreme court's initial inquiry focuses on the language of the statute, and the court will avoid statutory interpretation that renders language meaningless or superfluous.
5. STATUTES.
   If the statute's language is clear and unambiguous, the supreme court will enforce the statute as written.
6. STATUTES.
   Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, will the supreme court look beyond the language of the statute to consider its meaning in light of its spirit, subject matter, and public policy.
7. ASSAULT AND BATTERY.
   Only a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery. NRS 200.481.
8. SENTENCING AND PUNISHMENT.
   State failed to establish the requisite prior domestic battery misdemeanor convictions necessary to enhance defendant's domestic battery offense to a felony and to sentence him as a habitual criminal; while State provided exhibits showing prior convictions at the preliminary hearing in the justice court, it did not provide the same evidentiary material at trial in the district court, and thus, State failed to establish the existence and constitutional validity of the prior domestic battery misdemeanor convictions. NRS 200.485, 207.010(1)(b).
9. CONSTITUTIONAL LAW.
   Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt. U.S. CONST. amend. 14.
10. SENTENCING AND PUNISHMENT.
    If State seeks to use prior misdemeanor convictions to enhance a current offense to a felony, it must also make an affirmative showing of the constitutional validity of the prior convictions; this includes demonstrating either that counsel was present during the prior misdemeanor proceedings or that the right to counsel was validly waived, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings. U.S. CONST. amend. 6.

Before CHERRY, SAITTA and GIBBONS, JJ.

OPINION

By the Court, SAITTA, J.:

In this appeal, we consider two primary issues. We first address whether spitting on another constitutes a battery under NRS 200.481. We hold that it does. Next, we consider whether the State sufficiently established the requisite prior domestic battery misdemeanor convictions to enhance appellant Timothy Lee Hobbs' current offense to a felony. We hold that it did not. We therefore affirm in part and reverse in part the judgment of conviction, and we remand to the district court for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Patricia McClain was at a nail salon having her nails done when Hobbs, her ex-boyfriend, entered and became angry. He was upset that she was spending money to have her nails done. After a relatively short public argument between the two, Hobbs briefly left the salon, only to return a short time later. Hobbs again became angry with McClain for having her nails done. He then spit in her face. She immediately broke down into tears, feeling embarrassed and humiliated. Hobbs then left the salon and subsequently returned with a rock in his hand, approached McClain's vehicle, and threw the rock through the vehicle's windshield.

Respondent State of Nevada charged Hobbs by criminal complaint with domestic battery, injury to other property, and a habitual criminal enhancement. In particular, the complaint alleged that because Hobbs had two prior domestic battery misdemeanor convictions, the State would seek to elevate the current offense to a felony under NRS 200.485, Nevada's domestic battery statute, if it obtained a conviction. The complaint also alleged that the State would seek a habitual criminal enhancement under NRS 207.010, Nevada's habitual criminal statute, due to Hobbs' prior felony convictions. A preliminary hearing was held in justice court, at which time the State offered Hobbs' two prior domestic battery convictions into evidence. Hobbs stipulated to their admission. He was then bound over on the charges, and a criminal information was filed in the district court. The evidence from the preliminary hearing—specifically, the certified copies of the two prior domestic battery misdemeanor convictions—was transferred to the district court.

Subsequently, Hobbs filed a petition for a writ of habeas corpus, which was opposed by the State, arguing that spitting did not constitute the use of force or violence required for a battery under NRS 200.481. The district court held a hearing on the matter, found that spitting did amount to the use of force or violence as contemplated by NRS 200.481, and dismissed the petition. The case then proceeded to trial, where the jury found Hobbs guilty of domestic battery and injury to other property.

At sentencing, the State sought to sentence Hobbs as a habitual felon and offered the presentence investigation report (PSI) and six certified copies of Hobbs' prior felony convictions in support. The district court inquired whether there were any errors of a factual nature in the PSI, which described the two prior domestic battery misdemeanor convictions. Hobbs' counsel responded in the negative. Notably, although the State submitted evidence of Hobbs' prior felony convictions, it did not, at the sentencing hearing, present any evidence of or mention Hobbs' prior domestic battery misdemeanor convictions, nor did it attempt to demonstrate the

constitutional validity of those convictions. The district court also did not indicate that it had reviewed the certified prior convictions that were transmitted from the justice court or that it had determined that they were constitutionally valid. Ultimately, the district court enhanced Hobbs' current domestic battery conviction to a felony and determined that he should be sentenced as a habitual criminal, sentencing him to 10 to 25 years in prison for domestic battery and 1 year for injury to other property, both sentences to run concurrently. Hobbs now appeals.

DISCUSSION

Spitting on another constitutes the ''use of force or violence'' required for a battery under NRS 200.481

[Headnote 1]

Hobbs argues that the act of spitting on another does not amount to a battery. In particular, he asserts that spitting does not constitute the ''use of force or violence'' required for a battery under NRS 200.481[1] and contends, based on the cases he relies on, that a battery must be violent or result in physical harm or pain. Hobbs' argument presents us with an issue of first impression, as we have not previously addressed this question or the scope and meaning of the phrase ''use of force or violence'' in NRS 200.481.

[Headnotes 2-6]

Statutory interpretation is an issue of law subject to de novo review. *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004). Our objective in construing a statute is to give effect to the Legislature's intent. *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). Traditional rules of statutory interpretation are employed to accomplish that result. *Id*. Our initial inquiry focuses on the language of the statute, and we avoid statutory interpretation that renders language meaningless or superfluous. *Butler v. State*, 120 Nev. 879, 892-93, 102 P.3d 71, 81 (2004). If the statute's language is clear and unambiguous, we enforce the statute as written. *Sheriff v. Witzenburg*, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006). Only when the statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, do we ''look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy.'' *Butler*, 120 Nev. at 893, 102 P.3d at 81.

The statutory definition of battery is ''any willful and unlawful use of force or violence upon the person of another.''

[1]Although Hobbs was convicted of domestic battery pursuant to NRS 200.485, the statute uses the term ''battery'' as it is defined in NRS 200.481, Nevada's criminal battery statute. NRS 200.485(9)(b). As such, our inquiry focuses on NRS 200.481.

NRS 200.481(1)(a). At first blush, NRS 200.481 might appear to include physical harm or pain as an element of the offense of battery, given that it requires the use of force or violence. The presence or absence of ''substantial bodily harm'' does affect punishment (NRS 200.481(2)(a)-(g)); however, it is not included as an element of simple battery. *See* NRS 200.481(1)(a). Instead, Nevada's battery statute requires the ''use of force or violence.'' *Id*. A common definition of ''force'' is ''[p]ower, violence, or pressure directed against a person or thing.'' *Black's Law Dictionary* 717 (9th ed. 2009). Thus, the language of NRS 200.481 indicates that nonharmful and nonviolent force suffices, given the Legislature's use of the phrase ''force *or* violence''; otherwise, the use of the word ''or'' is rendered meaningless. NRS 200.481(1)(a) (emphasis added). In sum, under NRS 200.481, the ''willful and unlawful use of . . . force . . . upon the person of another'' amounts to criminal battery; that force need not be violent or severe and need not cause bodily pain or bodily harm. Our construction comports with the common law definition of battery. 2 Charles E. Torcia, *Wharton's Criminal Law* § 177, at 414-15 (15th ed. 1994) (''At common law, the contact need not result in physical harm or pain; it is enough that the contact be offensive.'').

Moreover, California's caselaw interpreting its battery statute, California Penal Code section 242, supports our interpretation. In 1925, when the Nevada Legislature adopted the current definition of battery, it replicated California's battery statute, which remains the same today. 1925 Nev. Stat., ch. 31, § 149, at 34; Nev. Compiled Laws § 10096 (1929) (specifically referencing California Penal Code section 242); *see also* Cal. Penal Code § 242 (West 2008) (''A battery is any willful and unlawful use of force or violence upon the person of another.''). California's jurisprudence addressing the meaning and scope of California Penal Code section 242 therefore serves as persuasive authority for our examination of NRS 200.481.

[Headnote 7]

A California court of appeal recently noted that, ''[e]ven though the statutory definition of battery requires 'force or violence,' this has the special legal meaning of a harmful or offensive touching.'' *People v. Page*, 20 Cal. Rptr. 3d 857, 863 n.1 (Ct. App. 2004) (citation omitted). That interpretation of California Penal Code section 242 has significant support in California's caselaw. As the California Supreme Court has explained:

> ''It has long been established, both in tort and criminal law, that 'the least touching' may constitute battery. In other words, *force* against the person is enough, it need not be vi-

> olent or severe, it need not cause bodily harm or even pain, and it need not leave any mark.''

People v. Colantuono, 865 P.2d 704, 709 n.4 (Cal. 1994) (quoting *People v. Rocha*, 479 P.2d 372, 377 n.12 (Cal. 1971)). Thus, ''[o]nly a slight unprivileged touching is needed to satisfy the force requirement of a criminal battery.'' *People v. Ausbie*, 20 Cal. Rptr. 3d 371, 375 n.2 (Ct. App. 2004), *disapproved of on other grounds by People v. Reed*, 137 P.3d 184 (Cal. 2006). Because ''the least touching'' may constitute battery, California courts have even observed that in section 242, ''[t]he word 'violence' has no real significance.'' *People v. Mansfield*, 245 Cal. Rptr. 800, 802-03 (Ct. App. 1988). In accordance with this general interpretation of the phrase ''force or violence'' in section 242, the California Supreme Court has held that spitting on another is a battery, *People v. Hamilton*, 200 P.3d 898, 953-54 (Cal. 2009), and that conduct such as ''throwing a cup of urine in a person's face'' constitutes battery. *People v. Pinholster*, 824 P.2d 571, 622 (Cal. 1992), *disapproved of on other grounds by People v. Williams*, 233 P.3d 1000 (Cal. 2010).[2] In holding that spitting on another constitutes battery, California is in accord with courts from other jurisdictions and a variety of treatises. *See, e.g.*, *U.S. v. Lewellyn*, 481 F.3d 695, 697-99 (9th Cir. 2007); *State v. Lachney*, 621 So. 2d 846, 847-48 (La. Ct. App. 1993); *Com. v. Cohen*, 771 N.E.2d 176, 177-78 (Mass. App. Ct. 2002); Wayne R. LaFave, *Criminal Law* § 16.2, at 860 (5th ed. 2010); 2 Charles E. Torcia, *Wharton's Criminal Law* § 177, at 415 (15th ed. 1994).

In conclusion, the language and meaning of NRS 200.481 is clear; at a minimum, battery is the intentional and unwanted exertion of force upon another, however slight. Because the record clearly demonstrates that Hobbs intentionally spat on McClain and because spitting on another amounts to the use of force or vi-

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[2]It is worth noting that the relevant California jury instruction comports with this caselaw. The jury instruction defining ''force and violence'' states:

> As used in the foregoing instruction, the words ''force'' and ''violence'' are synonymous and mean any [unlawful] application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest [unlawful] touching, if done in an insolent, rude, or an angry manner, is sufficient.
>
> It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustifiable.
>
> The touching essential to a battery may be a touching of the person, of the person's clothing, or of something attached to or closely connected with the person.

California Jury Instructions, Criminal 16.141 (Spring 2010 ed.) (alterations in original).

olence as contemplated by NRS 200.481, we conclude that Hobbs was properly convicted of domestic battery pursuant to NRS 200.485 and that the district court properly dismissed Hobbs' petition for a writ of habeas corpus.[3]

The State failed to establish the requisite prior domestic battery misdemeanor convictions to enhance Hobbs' current offense to a felony

[Headnote 8]

Hobbs argues that the State failed to prove, at the sentencing hearing, that he had two prior domestic battery misdemeanor convictions. He asserts that because the State failed to do so, the district court erroneously enhanced his current domestic battery offense, for spitting on McClain, to a felony under NRS 200.485.[4]

Nevada's domestic battery statute, NRS 200.485, provides that a defendant's third domestic violence battery conviction within seven years must be enhanced to a felony and punished as such under NRS 193.130. NRS 200.485(1)(c). It further states that:

> An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense . . . . *The facts concerning a prior offense must be . . . proved at the time of sentencing*

[3]Hobbs cites to a variety of cases from other jurisdictions in support of his argument that spitting does not amount to the use of force or violence required for a battery under NRS 200.481; however, none of the cases he relies on are based on that jurisdiction's battery statute. *See U.S. v. Maldonado-Lopez*, 517 F.3d 1207, 1209-10 (10th Cir. 2008) (examining whether Colorado's harassment statute involves a crime of violence for federal sentencing enhancement purposes); *Garcia-Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir. 2008) (considering whether an aggravated battery of a police officer, consisting of grabbing the officer's fingers and twisting them, amounted to a crime of moral turpitude for deportation purposes); *U.S. v. Belless*, 338 F.3d 1063, 1067-69 (9th Cir. 2003) (examining whether a Wyoming domestic battery conviction is a predicate offense for a felony federal firearm conviction); *Johnson v. State*, 858 So. 2d 1071, 1072 (Fla. Dist. Ct. App. 2003) (examining whether battery conviction for spitting on a law enforcement officer was a qualifying offense for sentencing as a violent career criminal and, interestingly, taking no issue with the underlying battery conviction); *State v. Mack*, 12 S.W.3d 349, 352-53 (Mo. Ct. App. 2000) (considering whether spitting constitutes ''the commission of violence against an employee of the department of corrections,'' a statutory offense separate and distinct from battery).

[4]The State makes a brief contention that Hobbs failed to raise this issue below. Even assuming, for the sake of argument, that Hobbs neglected to object to the State's lack of proof, his failure to do so would not divest the State of its due process burden to prove each element of the sentence enhancement beyond a reasonable doubt or to make an affirmative showing of the constitutional validity of the prior misdemeanor convictions, *see Phipps v. State*, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995); *Dressler v. State*, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991), absent a clear stipulation to or waiver of proof of the prior convictions. *Krauss v. State*, 116 Nev. 307, 310, 998 P.2d 163, 165 (2000).

> and, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination . . . .

NRS 200.485(4) (emphasis added).

[Headnotes 9, 10]

Broadly speaking, ''[d]ue process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement beyond a reasonable doubt.'' *Phipps v. State*, 111 Nev. 1276, 1280, 903 P.2d 820, 823 (1995) (quoting *People v. Tenner*, 862 P.2d 840, 845 (Cal. 1993)). If the State seeks to use prior misdemeanor convictions to enhance a current offense to a felony, it must also make an affirmative showing of the constitutional validity of the prior convictions. *Dressler v. State*, 107 Nev. 686, 697, 819 P.2d 1288, 1295 (1991). This includes demonstrating ''either that counsel was present [during the prior misdemeanor proceedings] or that the right to counsel was validly waived, and that the spirit of constitutional principles was respected in the prior misdemeanor proceedings.'' *Id.*

The State's complaint alleged that Hobbs had two prior domestic battery misdemeanor convictions and that the State would seek to elevate the current offense to a felony if Hobbs was convicted. The State then presented evidence of the prior convictions at the preliminary hearing, and that evidence was transferred to the district court. Crucially, though, once the case was bound over to the district court, the State did not present evidence of the prior misdemeanor convictions, nor did it demonstrate the constitutional validity of the misdemeanor offenses. In particular, at sentencing, the record is devoid of any mention of the prior misdemeanor convictions, either by the district court or the State.

Even though the prior offenses were presented to the justice court, its role was limited and confined to a probable cause determination. *See* NRS 4.370; NRS 171.206. In fact, we have expressly held that while the State must substantiate the existence of the offenses at the preliminary examination, the constitutional validity of the prior convictions is not for the justice court to determine. *Parsons v. State*, 116 Nev. 928, 936, 10 P.3d 836, 841 (2000). Rather, that issue ''is for the trial court to determine at, or anytime before, sentencing.'' *Id.*; *see also Hudson v. Warden*, 117 Nev. 387, 394-95, 22 P.3d 1154, 1159 (2001); *Ronning v. State*, 116 Nev. 32, 33-34, 992 P.2d 260, 261 (2000); NRS 200.485(4). In sum, the State failed to establish the existence and constitutional validity of the prior domestic battery misdemeanor convictions; mere transmission of the exhibits used at the preliminary hearing from the justice court to the district court was insufficient. We therefore conclude that Hobbs' current offense was erroneously enhanced to a felony under NRS 200.485. Because the current offense was improperly enhanced to a felony, Hobbs' habitual crim-

inal adjudication is likewise invalid. *See* NRS 207.010(1)(b) (current offense must be a felony for purposes of habitual criminal statute). As a result, we reverse the felony conviction and habitual criminal adjudication and remand the case to the district court to sentence Hobbs for a misdemeanor offense. *See Phipps*, 111 Nev. at 1279, 903 P.2d at 822 (reversing and remanding to resentence for a misdemeanor offense where the State failed to comply with the statutory requirements for enhancement); *Robertson v. State*, 109 Nev. 1086, 1089, 863 P.2d 1040, 1042 (1993) (remanding with instructions to resentence defendant for a misdemeanor offense because ''[t]here is no statutory mechanism which permits the district court to conduct a second sentencing hearing for the purpose of receiving evidence which the state neglected to present during the first sentencing hearing''), *overruled on other grounds by Krauss v. State*, 116 Nev. 307, 998 P.2d 163 (2000); *Pettipas v. State*, 106 Nev. 377, 380, 794 P.2d 705, 707 (1990) (remanding to resentence the defendant for a misdemeanor offense where there was an insufficient showing that the prior misdemeanor conviction was constitutionally valid).[5]

CONCLUSION

We conclude that spitting amounts to the ''use of force or violence'' as contemplated by NRS 200.481 and therefore constitutes battery under that statute. We further conclude that the State failed to prove the existence and constitutional validity of Hobbs' prior domestic battery misdemeanor convictions and therefore that the enhancement of the domestic battery to a felony and the subsequent adjudication of Hobbs as a habitual criminal were erroneous. We therefore affirm in part and reverse in part the judgment of conviction and remand the case to the district court for further proceedings consistent with this opinion.[6]

CHERRY and GIBBONS, JJ., concur.

[5]We note for the purpose of clarity that our holding is not based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (requiring that facts that increase the maximum penalty for an offense, other than the existence of prior convictions, must be found by a jury beyond a reasonable doubt), and should not be confused with *Apprendi* and its progeny.

[6]Given our resolution, we need not reach Hobbs' remaining contentions.

ROBERT LESLIE STOCKMEIER, APPELLANT/CROSS-RESPONDENT, *v.* THE STATE OF NEVADA, BOARD OF PAROLE COMMISSIONERS AND DIVISION OF PAROLE & PROBATION OF THE DEPARTMENT OF PUBLIC SAFETY; PAROLE CHAIRMAN DORLA M. SALLING; PAROLE COMMISSIONER TAMI BASS; PAROLE COMMISSIONER M. SILVA; PAROLE COMMISSIONER YOLANDA MORALES; DIVISION CHIEF OF PAROLE AND PROBATION JOHN A. GONSKA; AND DPS SGT. MAURY REICHELT, RESPONDENTS/CROSS-APPELLANTS.

No. 52099

May 19, 2011 255 P.3d 209

Proper person appeal and counsel cross-appeal from a district court summary judgment in a tort and civil rights action. Sixth Judicial District Court, Pershing County; John M. Iroz, Judge.

Inmate filed post-sentencing tort and civil rights action to require Board of Parole Commissioners and Division of Parole and Probation to amend presentence investigation report (PSI) by correcting alleged factual errors. The district court granted summary judgment to defendants. Both sides filed appeals. The supreme court, HARDESTY, J., held that: (1) neither Division nor the district court had authority to amend a defendant's PSI once he had been sentenced; (2) any claim of inaccuracy in a PSI had to be made to the district court at or before sentencing and, if not resolved in the defendant's favor, on direct appeal to the supreme court after sentencing; (3) Parole Board was entitled, in context of tort claim, to rely on inmate's original PSI; and (4) there was no evidence that Parole Board denied parole based on inmate's successful litigation of First Amendment claim against Psychological Review Board, precluding declaratory or injunctive relief for inmate on retaliation claim.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied September 29, 2011]

[En banc reconsideration denied May 23, 2012]

Robert Leslie Stockmeier, Lovelock, in Proper Person.

Catherine Cortez Masto, Attorney General, and *Alicia L. Lerud*, Deputy Attorney General, Carson City, for Respondents/Cross-Appellants.

1. CIVIL LAW.

The supreme court reviews a district court's summary judgment de novo.

2. JUDGMENT.
   Conjecture and speculation do not create an issue of fact that precludes summary judgment.
3. ADMINISTRATIVE LAW AND PROCEDURE.
   An administrative agency's powers are generally limited to the powers set forth by statute, although certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties; in other words, for implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty.
4. SENTENCING AND PUNISHMENT.
   Because the sentencing court will rely on a defendant's presentence investigation report (PSI), the PSI must not include information based on impalpable or highly suspect evidence. NRS 176.135(1), 176.145(1).
5. SENTENCING AND PUNISHMENT.
   Given that Division of Parole and Probation had no authority to amend defendant's presentence investigation report after sentencing, it could not be liable in tort for declining to do so. NRS 176.133 *et seq.*, 213.1071 *et seq.*, 213.1092 *et seq.*
6. SENTENCING AND PUNISHMENT.
   Division of Parole and Probation does not have any implied authority to amend a prisoner's presentence investigation report once defendant has been sentenced; applicable statutes do not confer any express duty to do so, and therefore, there is no implied authority that is essential to carrying out an express duty. NRS 176.133 *et seq.*, 213.1071 *et seq.*, 213.1092 *et seq.*
7. SENTENCING AND PUNISHMENT.
   The district court has no express, implied, or inherent authority to amend a defendant's presentence investigation report (PSI) post-sentence after completing its final statutory duty with regard to the PSI by causing a copy to be transmitted to the Director of the Department of Corrections once the defendant is sentenced. NRS 176.133 *et seq.*, 176.159(1), 213.1071 *et seq.*, 213.1092 *et seq.*
8. SENTENCING AND PUNISHMENT.
   Any claim of inaccuracy in a presentence investigation report must be made to the district court at or before sentencing and, if not resolved in defendant's favor, on direct appeal to the supreme court after sentencing. NRS 176.133 *et seq.*, 213.1071 *et seq.*, 213.1092 *et seq.*
9. SENTENCING AND PUNISHMENT.
   While the supreme court generally will not grant relief to a defendant with regard to an alleged factual inaccuracy in a presentence investigation report that did not affect defendant's sentence, some inaccuracies may be so harmful that, even if they do not actually affect the defendant's sentence, they still may be materially prejudicial because of their potential effect on defendant's prison classification or parole eligibility.
10. SENTENCING AND PUNISHMENT.
    Defendant waived the opportunity to have alleged factual inaccuracies in presentence investigation report (PSI) addressed, though defendant objected to the PSI at sentencing, when defendant failed to seek a ruling from the district court as to those issues and failed to raise those issues on direct appeal in order to give the supreme court an opportunity to address the allegations.
11. PARDON AND PAROLE; SENTENCING AND PUNISHMENT.
    Board of Parole Commissioners was entitled, in context of tort claim by inmate alleging that Parole Board had knowingly relied on false infor-

mation in denying parole, to rely on the inmate's original presentence investigation report (PSI), despite inmate's assertion that original PSI contained factual inaccuracies; inmate failed at sentencing and on direct appeal to pursue that objection, and no entity had post-sentencing authority to amend PSI. NRS 176.133 *et seq.*, 213.1071 *et seq.*, 213.1092 *et seq.*

12. PARDON AND PAROLE.

There was no evidence that Board of Parole Commissioners had denied parole to inmate based on inmate's successful litigation of First Amendment claim against Psychological Review Board, precluding declaratory or injunctive relief for inmate on retaliation claim against Parole Board; inmate was denied parole based on allegations in the presentence investigation report and the seriousness of his sexual assaults against nine-year-old boy. U.S. CONST. amend. 1.

13. PARDON AND PAROLE.

Board of Parole Commissioners enjoyed quasi-judicial immunity for its decision to deny parole to inmate, although that immunity did not preclude declaratory or injunctive relief.

14. CONSTITUTIONAL LAW.

To state a claim for retaliation in the prison context, an inmate generally must assert that a state actor has taken adverse action that chilled inmate's protected exercise of First Amendment rights without reasonably advancing a legitimate correctional goal; if inmate does not allege a chilling effect, the claim may survive only if inmate establishes that he has suffered harm. U.S. CONST. amend. 1.

Before DOUGLAS, C.J., PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

This proper person appeal and counsel cross-appeal arise from appellant's attempts to have certain factual statements in his presentence investigation report (PSI) amended to correct alleged factual inaccuracies. The primary question we are called on to decide is whether, under Nevada law, a prisoner may seek to amend his PSI after he has been sentenced. Because Nevada lacks a statutory or administrative process by which a prisoner may challenge alleged inaccuracies in his PSI post-sentencing, we conclude that any claimed inaccuracy in a PSI must be made to the district court at or before sentencing and, if not resolved in the defendant's favor, on direct appeal to this court after sentencing. Thus, in these appeals, neither respondent/cross-appellant Division of Parole and Probation nor the district court had the authority to amend appellant's PSI after he was sentenced, and respondent/cross-appellant Parole Board may properly rely on the PSI when it makes any future parole determinations concerning appellant.

FACTUAL AND PROCEDURAL HISTORY

In 1990, appellant Robert Leslie Stockmeier pleaded guilty to two counts of sexually assaulting a nine-year-old boy. Neither

count alleged the threat or use of a weapon. Stockmeier's PSI, however, stated that the victim had reported that Stockmeier threatened him with a weapon during the course of the offense.[1] At his sentencing hearing, Stockmeier objected to this statement, as well as other factual allegations in the PSI, including a statement regarding an advertisement found in a search of Stockmeier's home during the criminal investigation. The sentencing court noted Stockmeier's objections to the PSI, but did not rule on them. The court sentenced Stockmeier to two consecutive life sentences, and he did not file a direct appeal. Instead, Stockmeier filed two post-conviction petitions, neither of which challenged the weapon allegation or the statement about the advertisement.

Ten years later, in 2000, after being denied parole eligibility by the Psychological Review Panel, Stockmeier filed a district court action raising, for the first time since his sentencing hearing, his objections to the PSI's factual statements regarding the weapon allegation and the advertisement. The district court denied the petition, concluding that it lacked jurisdiction to amend the PSI based on an untimely post-conviction petition.

Stockmeier then requested that respondent Division of Parole and Probation of the Department of Public Safety amend his PSI, but the Division ultimately denied his request as well. Thereafter, Stockmeier attempted to present evidence to respondent Board of Parole Commissioners that contradicted the statements in the PSI. The Parole Board stated that its policy was not to consider challenges to a PSI and that, despite Stockmeier's assertions, it would nonetheless rely on the PSI in making any parole determinations.

Between 2003 and 2006, Stockmeier successfully litigated an action against the Psychological Review Panel on claims unrelated to his PSI. He was again eligible for parole in 2006, when the Parole Board, for the first time, found that his offense had involved a weapon and considered the involvement of the weapon in evaluating whether he would receive parole. The Parole Board denied Stockmeier parole based on the nature and severity of his crimes and public safety concerns.

Following the 2006 parole denial, Stockmeier filed the instant action in the district court, asserting (1) a tort claim against the Division for declining to amend his PSI, (2) a tort claim against the Parole Board for knowingly relying on the PSI after he presented evidence that it contained incorrect factual statements, and (3) a retaliation claim against the Parole Board for denying him parole in

[1]The PSI apparently stated that the victim's seven-year-old brother made the statement regarding the weapon, but Stockmeier and the State agreed in the district court that the PSI was supposed to refer to the victim, instead of his brother.

2006 based on his successful litigation against the Psychological Review Panel. Respondents moved for dismissal; Stockmeier opposed the motion.

At a hearing on the motion to dismiss, the district court stated that it believed that any inaccuracies in the PSI needed to be corrected. Respondents asserted that the Division generally will not change a PSI once a defendant has been sentenced. Nevertheless, respondents agreed that if the PSI was inaccurate, it should be corrected. Respondents further indicated that they would be open to meeting with Stockmeier to discuss possible amendments if the court ordered them to do so. Thereafter, the district court ordered the parties to confer as to whether any of the factual statements in the PSI should be amended. The parties met and agreed, among other things, that the statement regarding the advertisement found in a search of Stockmeier's home was misleading, but they could not agree on wording for an amendment.

During a subsequent hearing on the matter, the district court stated that it would order the PSI to read that the search revealed ''a multiple page advertisement depicting family nudism.'' Stockmeier agreed to the district court's wording. No agreement on the weapon allegation was reached, as respondents contended that the statement was accurate. The district court considered evidence on the issue and declined to amend the statement as to the weapon allegation. The court also ordered additional amendments as agreed upon by the parties. The court then treated the motion for dismissal as one for summary judgment and granted respondents summary judgment on all of Stockmeier's claims. This appeal and cross-appeal followed.

DISCUSSION

Standard of review

[Headnotes 1, 2]

When a district court considers matters outside the pleadings in support of an NRCP 12(b)(5) motion, this court reviews the district court's order dismissing the complaint as if it had granted summary judgment. NRCP 12(b). We review a district court's summary judgment de novo. *Stalk v. Mushkin*, 125 Nev. 21, 24, 199 P.3d 838, 840 (2009). Summary judgment must be granted when the pleadings and record evidence, viewed in the light most favorable to the nonmoving party, demonstrate that there are no genuine issues as to any material facts and the moving party is entitled to judgment as a matter of law. *Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 308, 167 P.3d 408, 409 (2007). Conjecture and speculation do not create an issue of fact. *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005).

Summary judgment in favor of the Division of Parole and Probation

On appeal, Stockmeier contends that summary judgment in favor of the Division of Parole and Probation was improper because the Division had a duty to correct his PSI. Stockmeier does not identify any express authority that permits the Division to amend a prisoner's PSI after sentencing, yet he insists that the Division has inherent authority to correct its own mistakes and an implied power to amend a prisoner's PSI at any time. These contentions are not supported by Nevada law.

[Headnote 3]

An administrative agency's powers are generally limited to the powers set forth by statute, although ''certain powers may be implied even though they were not expressly granted by statute, when those powers are necessary to the agency's performance of its enumerated duties.'' *City of Henderson v. Kilgore*, 122 Nev. 331, 334, 131 P.3d 11, 13 (2006). In other words, for implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty. *Id.* at 335, 131 P.3d at 14. Thus, in order to determine whether the Division had express or implied authority to amend Stockmeier's PSI, it is necessary to review the relevant statutes.

[Headnote 4]

The Division of Parole and Probation is mandated by statute to prepare a PSI to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony. NRS 176.135(1). A PSI contains information about the defendant's prior criminal record, the circumstances affecting the defendant's behavior and the offense, and the impact of the offense on the victim. NRS 176.145(1). Because the sentencing court will rely on a defendant's PSI, the PSI must not include information based on ''impalpable or highly suspect evidence.'' *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982). To that end, after preparing a PSI, the Division must disclose the report's factual content to the prosecuting attorney, defense counsel, and the defendant, and give the parties the opportunity to object to any of the PSI's factual allegations.[2] NRS 176.156(1); *see also Shields v. State*, 97 Nev. 472, 472-73, 634 P.2d 468, 468-69 (1981) (reversing and remanding a defendant's sentence because he

[2]At the time that Stockmeier was sentenced, NRS 176.156 required the court, rather than the Division, to disclose the content of the PSI to the relevant parties and give them the opportunity to object. 1985 Nev. Stat., ch. 69, § 3, at 149. Because the earlier statutes provided the Division with fewer duties than the current statutes, this change does not affect our analysis in this appeal.

was not provided with police reports that were included in the PSI and were material to the district court's sentencing decision). Once a defendant is sentenced, the Division has no further statutory duties with regard to the defendant's PSI. *See generally* NRS 176.133-.159; NRS 213.1071-.1078; NRS 213.1092-.10988.

[Headnotes 5, 6]

Apart from the duties identified in the statute set out above, the Division does not have any statutory duties with regard to a prisoner's PSI. Thus, the Division has no express statutory authority to amend a prisoner's PSI after sentencing. *See* NRS 176.133-.159; NRS 213.1071-.1078; NRS 213.1092-.10988. And because the Division does not have any express post-sentencing duties related to a prisoner's PSI, the Division does not have any implied authority to amend a prisoner's PSI once he has been sentenced. *See City of Henderson*, 122 Nev. at 335, 131 P.3d at 14. Given that the Division had no authority to amend Stockmeier's PSI, it could not have been liable in tort for declining to do so, and thus, the district court properly granted summary judgment to the Division on Stockmeier's tort claim.[3]

Amendments ordered by the district court

[Headnote 7]

The district court directed respondents to discuss possible PSI corrections with Stockmeier. Subsequently, based on the parties' agreement, the district court ordered certain amendments to the PSI. On cross-appeal, respondents contend that the district court lacked authority to order such amendments. We agree. The district court's final statutory duty with regard to a defendant's PSI is to cause a copy of the report to be transmitted to the Director of the Department of Corrections once the defendant is sentenced, NRS 176.159(1), and, as with the Division, nothing in Nevada law gives the district court express, implied, or inherent authority to amend a prisoner's PSI post-sentencing.[4] *See generally* NRS 176.133-.159; NRS 213.1071-.1078; NRS 213.1092-.10988.

Because Nevada law does not provide any administrative or judicial scheme for amending a PSI after the defendant is sentenced,

[3]Additionally, based on our de novo review of the record, we conclude that Stockmeier made statements at a district court hearing waiving any monetary damages claims.

[4]The statutes in effect at the time of Stockmeier's sentencing did not address transmission of the PSI to the Department of Corrections. Instead, NRS 176.107 directed the district attorney who prosecuted the case to transmit a ''written statement of facts surrounding the commission of the offense'' to the Department. 1977 Nev. Stat., ch. 430, § 66, at 859. Again, this difference does not change our analysis because, even under the earlier laws, no authority existed for the district court to amend a defendant's PSI post-sentencing.

it is imperative that a defendant contest his PSI at the time of sentencing if he believes that his PSI contains inaccuracies. We recognize that the process by which the district court must resolve objections to a PSI is not entirely clear. Apart from requiring the Division to give the defendant an opportunity to object to his PSI, NRS 176.156(1), the Nevada statutes are silent as to the process to be followed by either the Division or the district court for allowing the defendant to make such objections, or for resolving the objections, and communicating the resolution to interested parties.[5]

[Headnotes 8, 9]

In the absence of any post-sentencing authority of either the Division or the district court to address alleged inaccuracies in a PSI, any objections must be resolved prior to sentencing, and, if not resolved in the defendant's favor, the objections must be raised on direct appeal. We emphasize that even if disputed factual statements do not affect a defendant's sentence, any significant inaccuracy could follow a defendant into the prison system and be used to determine his classification, placement in certain programs, and eligibility for parole, and thus, the defendant must promptly seek to correct any alleged inaccuracies to prevent the Department of Corrections from relying on a PSI that could not later be changed.[6] *See* NRS 176.159(1); *see also United States Dept. of Justice v. Julian*,

[5]The federal system, as well as other states, provides detailed procedures for addressing any objections to a defendant's PSI. *See* Fed. R. Crim. P. 32 (setting forth the federal procedure giving a defendant time before sentencing to object to his PSI and requiring the federal district court to make express findings regarding disputed portions of the PSI); *People v. Waclawski*, 780 N.W.2d 321, 357 (Mich. Ct. App. 2009) (discussing the Michigan scheme for resolving challenges to a PSI); *State v. Waterfield*, 248 P.3d 57, 59 (Utah Ct. App. 2011) (noting the Utah sentencing courts' statutory duty to consider a party's objections to a PSI and make findings on the record as to the accuracy and relevancy of the disputed information); *State v. Craft*, 490 S.E.2d 315, 319 (W. Va. 1997) (explaining that West Virginia's criminal procedure rules require a district court to make a finding as to PSI disputes or expressly determine that no such finding is necessary).

[6]While this court generally will not grant relief to a defendant with regard to an alleged factual inaccuracy in the PSI that did not affect the defendant's sentence, *cf. Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 489 (2009) (explaining that this court generally will only interfere with a defendant's sentence if the record reveals prejudice based on the district court's consideration of information supported by impalpable or highly suspect evidence), we recognize that some inaccuracies may be so harmful that, even if they do not actually affect the defendant's sentence, they still may be materially prejudicial because of their potential effect on the defendant's prison classification or parole eligibility. Nevertheless, we do not address the question of whether the alleged inaccuracies in Stockmeier's PSI reached the level of being materially prejudicial. Such a consideration may have been proper on direct appeal from Stockmeier's sentence, but Stockmeier did not appeal from his sentence, and, as discussed herein, alleged PSI inaccuracies are not appropriately considered in a post-sentencing civil action.

486 U.S. 1, 5-6 (1988) (noting that PSIs are used for determining status of an inmate, choosing treatment programs, deciding eligibility for privileges, and making parole decisions). Additionally, to allow a defendant to wait and challenge a PSI in a later action would open courts to a flood of litigation from prisoners seeking amendments to their PSIs long after being sentenced. Limiting such actions is important because the passage of time erodes the reliability of factual determinations, as evidence can become stale and witnesses may become unavailable.

[Headnote 10]

Here, Stockmeier took advantage of the opportunity to object to his PSI at sentencing. When the district court did not address the objections, however, Stockmeier failed to seek a ruling from the district court as to the disputed issues, and he failed to raise these issues on direct appeal in order to give this court an opportunity to address the allegations. Therefore, Stockmeier waived his opportunity to have the alleged inaccuracies addressed. Because the district court did not have any post-sentencing authority to order the amendments to Stockmeier's PSI, we reverse the portion of the district court's judgment ordering such amendments.[7]

Summary judgment in favor of the Parole Board

Tort claim

[Headnote 11]

Stockmeier asserts that the Division's refusal to amend his PSI has caused him to be subjected to greater punishment by the Parole Board because of the allegedly false information contained in the PSI. In his district court complaint, Stockmeier alleged that he informed the Parole Board that his PSI contained factual inaccuracies and asked the Board to correct them, but the Board declined to do so. He further stated that he appealed the 2006 denial of parole, attaching evidence that he contended supported his claims that the PSI was inaccurate, but the Parole Board ignored his evidence and

[7]Because the district court lacked authority to make additional changes to the PSI, we do not reach Stockmeier's arguments that the district court violated his due process rights or otherwise erred by using a confidential Navy report to decide whether to order the changes.

On appeal, Stockmeier argues, and respondents agree, that the district court improperly included in its order irrelevant information taken from the confidential Navy report. On pages six and seven of the district court's order, the court included information from the confidential report that was not included elsewhere in the record and was immaterial to the instant proceedings. We agree that this information should not have been included in the order. Accordingly, we reverse this portion of the judgment to the extent that it included this information, and we remand the matter to the district court with instructions that the court strike the first and third paragraphs of the section of its judgment entitled ''Allegations of Other Abuse.''

relied on the PSI in making its determination. Thus, Stockmeier asserted that the Parole Board knowingly relied on false information in violation of NRS Chapter 213, the Board's operating policies, and the common law. Stockmeier asked the district court for injunctive and declaratory relief prohibiting the Parole Board from relying on the allegedly false information in his PSI.

The Parole Board is required to adopt standards for determining whether to grant or deny parole. NRS 213.10885(1). Parole is an act of grace, however, and no one has a right to parole. NRS 213.10705; NRS 213.1099(1); *see also Severance v. Armstrong*, 96 Nev. 836, 839, 620 P.2d 369, 370 (1980) (recognizing that Nevada statutes ''do[ ] not confer a legitimate expectation of parole release and therefore do[ ] not create a constitutionally cognizable liberty interest sufficient to invoke due process''). In considering a prisoner's eligibility for parole, the Parole Board may consider the prisoner's PSI and evidence submitted by the prisoner, but nothing in the Nevada Statutes gives the Parole Board the power to amend a prisoner's PSI or requires the Parole Board to consider evidence presented by a prisoner regarding the accuracy of his PSI. *See generally* NRS 213.108-.1089; NRS 213.1099-.142.

Stockmeier had the opportunity, at sentencing and on direct appeal, to challenge the alleged inaccuracies in his PSI, but he failed to pursue his objections then. Moreover, as discussed above, no entity had post-sentencing authority to amend Stockmeier's PSI, and thus, the Parole Board is entitled to rely on the original PSI. As a result, we affirm the district court's summary judgment to the Parole Board on Stockmeier's tort claim.

Retaliation claim

[Headnote 12]

Finally, Stockmeier argues that because absolute immunity is not a bar to declaratory or injunctive relief, the district court improperly granted summary judgment to the Parole Board on his retaliation claim based on absolute immunity. Respondents acknowledge that absolute immunity does not bar declaratory or injunctive relief, but they argue that Stockmeier was not entitled to either, and thus, summary judgment was proper.

[Headnote 13]

As acknowledged by the parties, the Parole Board enjoyed quasi-judicial immunity for its decision to deny Stockmeier parole. *See Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 312, 167 P.3d 408, 412 (2007); *State of Nevada v. Dist. Ct. (Ducharm)*, 118 Nev. 609, 616, 55 P.3d 420, 424 (2002). While such immunity did not preclude declaratory or injunctive relief, *see Bauer v. Texas*,

341 F.3d 352, 357 (5th Cir. 2003), Stockmeier still had to satisfy the summary judgment standard in order to move forward on his retaliation claim.

[Headnote 14]

To state a claim for retaliation in the prison context, an inmate must assert that a state actor has taken adverse action that chilled the inmate's protected exercise of his First Amendment rights without reasonably advancing a legitimate correctional goal. *Rhodes v. Robinson*, 408 F.3d 559, 567-68 (9th Cir. 2005). If an inmate does not allege ''a chilling effect,'' his claim may survive if he establishes that he has suffered harm. *Id.* at 567 n.11.

Here, the record evidence showed that Stockmeier was denied parole based on allegations in the PSI and the seriousness of his crime. In response to this evidence, Stockmeier argued that the Parole Board first found that the offense involved a weapon only after his successful litigation against the Psychological Review Panel. He further asserted that one of the Parole Board members mentioned the litigation during his parole hearing. Stockmeier's arguments, however, only amounted to conjecture and speculation. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (stating that conjecture and speculation will not defeat a motion for summary judgment). Stockmeier did not present any evidence establishing a genuine issue of material fact as to whether the Parole Board denied him parole based on his exercise of his right to litigate his claims, and thus, the Parole Board was entitled to judgment as a matter of law on the retaliation claim. *See Rhodes*, 408 F.3d at 567-68; *Wood*, 121 Nev. at 732, 121 P.3d at 1031. Thus, we also affirm the district court's summary judgment in favor of the Parole Board on appellant's retaliation claim.

For the reasons discussed herein, we affirm in part and reverse in part the district court's judgment and remand the matter to the district court for further proceedings consistent with this opinion.

DOUGLAS, C.J., and PICKERING, J., concur.

LAZARIO RUIZ, APPELLANT, *v.*
CITY OF NORTH LAS VEGAS, RESPONDENT.

No. 54762

May 19, 2011 255 P.3d 216

Appeal from a district court order dismissing a petition to vacate an arbitration decision and confirming the decision. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Following officer's termination, and pursuant to collective bargaining agreement (CBA), union filed a grievance on officer's behalf with the City. City denied the grievance, and union submitted the matter to arbitration pursuant to CBA. The arbitrator concluded that City had just cause to terminate officer. Union then assigned to officer its right to challenge the arbitration decision, and officer individually petitioned the district court to vacate the arbitration decision and to remand the matter for a new arbitration proceeding. The district court granted City's motion to dismiss, and officer appealed. The supreme court, HARDESTY, J., as matters of apparent first impression, held that: (1) officer was not a ''party'' to the arbitration proceeding between his union and his employer for purposes of appealing the arbitration decision pursuant to Nevada's Uniform Arbitration Act; (2) union's assignment of its rights under CBA, namely its right to appeal an arbitration decision, to police officer was ineffective; (3) statute, which allowed aggrieved peace officer to seek judicial relief for violations of the Peace Officer Bill of Rights, conferred standing on officer to seek judicial relief from the binding arbitration decision; and (4) officer exhausted the applicable internal grievance procedures required by Peace Officer Bill of Rights statute, and therefore, he had standing to challenge arbitration decision.

Reversed and remanded.

[Rehearing denied July 13, 2011]

Law Office of Daniel Marks and *Adam Levine* and *Daniel Marks*, Las Vegas, for Appellant.

Nicholas G. Vaskov, Acting City Attorney, *L. Steven Demaree*, Chief Deputy City Attorney, and *Chris Davis*, Deputy City Attorney, North Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   Whether standing exists is a question of law subject to de novo review.
2. LABOR AND EMPLOYMENT.
   Because the collective bargaining agreement's (CBA) express language limited arbitration rights to the union, police officer was not a ''party'' to the arbitration proceeding between his union and his employer

for purposes of appealing the arbitration decision pursuant to Nevada's Uniform Arbitration Act (UAA); neither UAA nor the CBA between union and City defined ''party'' to include individual union members. NRS 38.241.

3. LABOR AND EMPLOYMENT.
   Union's assignment of its rights under collective bargaining agreement (CBA), namely its right to appeal an arbitration decision, to police officer was ineffective because the CBA did not expressly permit such assignments and because permitting such assignments could have the effect of materially increasing the City's bargained-for obligations under the CBA.
4. ASSIGNMENTS.
   While the general rule is that contracts are freely assignable in the absence of language to the contrary, an assignment that has the effect of increasing the nonassigning party's obligations or risks under the contract is prohibited.
5. LABOR AND EMPLOYMENT.
   Unless collective bargaining agreement expressly permits assignment of union's rights to a union member, such an assignment is invalid.
6. LABOR AND EMPLOYMENT.
   Statute, which allowed an aggrieved peace officer to seek judicial relief for violations of the Peace Officer Bill of Rights, conferred standing on police officer to seek judicial relief from binding arbitration decision, even though officer was not a ''party'' to the arbitration proceeding who was able to challenge the decision under Nevada's arbitration laws; statute granted officer standing to individually challenge the arbitration decision because the decision upheld his termination that was based upon information allegedly obtained in violation of his Peace Officer Rights. NRS 289.120.
7. LABOR AND EMPLOYMENT.
   Police officer exhausted the applicable internal grievance procedures required by Peace Officer Bill of Rights statute, and therefore, he had standing to challenge arbitration decision in district court; in its initial grievance, union alleged four specific violations of officer's Peace Officer Rights, the most notable of which was the allegation that officer was not provided with any notice that he was going to be questioned about the alleged robbery, and upon submitting grievance to arbitrator, union again made clear that improper reliance on information obtained in violation of officer's rights contributed to City's decision to terminate him, and at both stages in grievance process, union's argument rested upon alleged Peace Officer Bill of Rights violations. NRS 289.120.

Before DOUGLAS, C.J., PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we address whether an individual peace officer, rather than the union to which he belongs and which pursued arbitration on his behalf, may seek judicial relief from the binding arbitration decision that ensued. While we recognize that the peace officer was not a ''party'' to the arbitration proceeding able to

challenge the decision under Nevada's arbitration laws and that a union generally cannot assign its collectively bargained-for rights to challenge an arbitration decision to an individual officer, we conclude that NRS 289.120, which allows an aggrieved peace officer to seek judicial relief for violations of the Peace Officer Bill of Rights, confers standing in such a circumstance. As we also conclude that the peace officer here met the prerequisites for proceeding under NRS 289.120 by grieving the alleged violations internally and under the collective bargaining agreement, we reverse the district court's order dismissing the officer's petition to vacate the arbitrator's decision.

FACTS

Appellant Lazario Ruiz was employed by respondent, the City of North Las Vegas (the City), as a police officer with the North Las Vegas Police Department (NLVPD). Ruiz was a member of the North Las Vegas Police Officers Association (the Union), a police officers' union with which the City had a collective bargaining agreement (CBA). Under the CBA, the City and the Union agreed to abide by a series of internal grievance procedures in the event that a Union member was terminated from his or her employment. The CBA first required the aggrieved employee to present a written complaint to the Union Grievance Committee. If the Committee determined that a genuine grievance existed, then the Union was required to present the written complaint to the employee's Department Chief, at which point the Department Chief had ten days to respond. If the Union found the Department Chief's response to be unacceptable, the Union was then required to submit the grievance to the City Manager. If the Union and the City Manager were unable to reach a mutually satisfactory settlement of the grievance, the CBA provided that ''the Union [but not the Union member] shall have the right'' to submit the matter to binding arbitration.

While off duty, Officer Ruiz witnessed an altercation between his brother and his brother's business partner. During NLVPD's response to what it believed may have been a robbery, Officer Ruiz was interviewed by a superior officer concerning the altercation. Officer Ruiz was then directed to report to NLVPD headquarters, where a further interview was conducted. Without his knowledge or consent, Officer Ruiz's second interview was observed by one of NLVPD's Internal Affairs officers.

Based upon what it perceived to be a lack of truthfulness in Officer Ruiz's interview statements and unprofessional conduct on his part, NLVPD terminated Ruiz's employment. Following Ruiz's termination, and pursuant to the CBA, the Union filed a grievance on his behalf with the City. The grievance was based largely on al-

leged violations of the Peace Officer Bill of Rights, codified at NRS 289.010-.120, which requires a police officer's employer to abide by certain procedural safeguards when conducting an internal investigation.[1] In particular, the grievance stated the following:

> The specific grounds for Officer Ruiz's and the [Union's] collective grievance is based on the due process violation Officer Ruiz suffered during the Department's investigation of an alleged robbery . . . . During such an investigation, it is believed that the Department effectively violated his rights guaranteed to him under the [Peace] Officer Bill of Rights—specifically NRS sections—289.057, 289.060, and 289.080.

The Union's grievance went on to assert several specific violations of Ruiz's rights resulting from his questioning about the alleged robbery, concluding with the following statement:

> [T]he [Union] believes that the rights of Officer Ruiz have been violated and the severe discipline imposed should be stricken. Further, it is the [Union's] belief and assertion that such information gained in violation of NRS Chapter 289, will be barred from admission in any subsequent judicial or arbitration hearing as it is prejudicial to Officer Ruiz and prohibited under NRS 289.085.[2]

The City denied Ruiz's grievance, concluding, with respect to the alleged Peace Officer Rights violations, that Ruiz's ''allegations of procedural misconduct [did not] have merit.'' In light of the City's denial of Ruiz's grievance, the Union submitted the matter to arbitration pursuant to the CBA. Although the overarching premise of the Union's argument to the arbitrator was that Ruiz had been terminated without just cause, the Union also filed a motion in limine, seeking to exclude statements made by Ruiz that were allegedly obtained in violation of his Peace Officer Rights.

Without ruling definitively on the Union's motion in limine, the arbitrator entertained the substance of both parties' arguments, which included evidence that the Union had sought to exclude. After the hearing, the arbitrator concluded that NLVPD had just cause to terminate Ruiz. Not reaching the merits of all of Ruiz's arguments as to the Peace Officer Bill of Rights, the arbitrator determined that NLVPD had not commenced an official internal in-

[1]For example, NRS 289.060(1) mandates that ''not later than 48 hours before any interrogation or hearing is held relating to an investigation,'' the peace officer's employer must ''provide written notice to the peace officer'' of the interrogation or hearing. Similarly, NRS 289.060(3)(c) requires an interrogating officer to ''[l]imit the scope of the questions during the interrogation or hearing to the alleged misconduct of the peace officer.'' The Union's grievance alleged that NLVPD had violated these two requirements.

[2]NRS 289.085 requires courts and arbitrators to exclude evidence obtained in violation of the Peace Officer Bill of Rights in specific circumstances.

vestigation of Ruiz at the time he made his statements and, consequently, any rights that Ruiz had under the Peace Officer Bill of Rights were not triggered.

The Union then assigned to Ruiz its right to challenge the arbitration decision, and Ruiz individually petitioned the district court to vacate the arbitration decision and to remand the matter for a new arbitration proceeding. Subsequently, the City filed a motion to dismiss, arguing that Ruiz lacked standing to file the petition because he was a nonparty to the arbitration proceeding. The district court agreed and granted the City's motion, further concluding that the right to challenge the arbitration decision was not assignable and that Ruiz had not met the prerequisites to sue under the Peace Officer Bill of Rights. This appeal followed.

DISCUSSION

On appeal, Ruiz presents three arguments as to why he had standing to individually petition the district court to vacate the arbitration decision: (1) under Nevada's Uniform Arbitration Act, he was a ''party'' to the arbitration proceeding capable of challenging the arbitration decision in district court; (2) the Union effectively assigned to him its rights under the CBA to pursue further dispute resolution; and (3) NRS 289.120 statutorily confers standing on aggrieved peace officers to seek judicial relief from Peace Officer Bill of Rights violations.[3]

Because the CBA's express language limited arbitration rights to the Union, we conclude that Ruiz was not a ''party'' to the arbitration proceeding for purposes of appealing the arbitration decision pursuant to Nevada's Uniform Arbitration Act. We also conclude that the Union's assignment of its rights to Ruiz was ineffective, as the CBA did not expressly permit such assignments and because otherwise permitting such assignments could have the effect of materially increasing the City's bargained-for obligations under the CBA. However, we conclude that Ruiz had standing under NRS 289.120 to seek relief in district court. Since NRS 289.120 confers standing upon an aggrieved peace officer, we then address the district court's determination that Ruiz failed to meet the statute's prerequisites to judicial review, and we conclude that the district court viewed those prerequisites too narrowly.

[3]Ruiz also contends that NRS 288.140(2) permits him to seek judicial relief separate and apart from any relief that might be available to him through the Union's CBA. We conclude that this argument lacks merit, as it is belied by the plain language of the statute. NRS 288.140(2) permits a government employee who has chosen *not* to become a union member to act on his or her own behalf in pursuing an employment-based grievance. The statute does not permit a union member to seek judicial relief in the event that he or she is unsatisfied with the outcome of CBA-negotiated grievance procedures.

Standard of review

[Headnote 1]

Whether standing exists is a question of law subject to our de novo review. *See Delaware Valley Surgical v. Johnson & Johnson*, 523 F.3d 1116, 1119 (9th Cir. 2008); *Mid-Hudson Catskill Ministry v. Fine Host*, 418 F.3d 168, 173 (2d Cir. 2005); *Citizens for Cold Springs v. City of Reno*, 125 Nev. 625, 629-32, 218 P.3d 847, 850-51 (2009) (applying de novo review in deciding upon whom a statute conferred standing).

Ruiz was not a ''party'' to the arbitration proceeding

[Headnote 2]

Ruiz's first argument is based on his interpretation of a provision in the Uniform Arbitration Act (UAA), which provides that, ''[u]pon motion to the court *by a party to an arbitral proceeding*, the court shall vacate an award made in the arbitral proceeding if: [one of several grounds is applicable].''[4] NRS 38.241 (emphasis added). In short, Ruiz argues that because the Union pursued the grievance and subsequent arbitration on his behalf, he should be deemed a ''party'' to the proceedings capable of challenging the decision in district court under the UAA. For the following reasons, we reject Ruiz's argument.

The issue of whether an individual employee has standing as a ''party'' to challenge a decision made in an arbitration proceeding between his union and his employer has never been addressed by this court. While we often look to other jurisdictions for guidance in such situations, the need to do so here is of particular importance: ''In applying and construing [the UAA], consideration *must* be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.'' NRS 38.248 (emphasis added); *see also Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113-16, 204 P.3d 1262, 1263-65 (2009) (looking to other jurisdictions' interpretations of a UAA provision when interpreting an analogous provision in Nevada's UAA).

Generally, other jurisdictions that have adopted the UAA have held that an individual employee does not have standing as a ''party'' to challenge an arbitration decision rendered in a proceeding between the employee's union and his or her employer. *See, e.g.*, *Eisen v. State, Dept. of Public Welfare*, 352 N.W.2d 731, 736 (Minn. 1984); *Stahulak v. City of Chicago*, 703 N.E.2d 44, 46 (Ill. 1998); *Miller v. Board of Regents of Higher Educ.*, 541 N.E.2d 989, 992-93 (Mass. 1989).

[4]In 2001, Nevada adopted the Uniform Arbitration Act of 2000, codified in NRS 38.206-.248. *See* NRS 38.206; 2001 Nev. Stat., ch. 280, § 1, at 1274.

We find the analysis of the Minnesota Supreme Court in *Eisen* to be particularly instructive. In *Eisen*, the court addressed the exact question before this court: ''whether [an individual employee] was a 'party' to the arbitration hearing for purposes of appeal under the Uniform Arbitration Act,'' as enacted in Minnesota. 352 N.W.2d at 733. The court first recognized that Minnesota's UAA failed to define ''party'' for purposes of grievance appeals. *Id.* at 734. As such, it then looked to the CBA to determine whether the individual employee could be considered a ''party.'' *Id.* at 734-35. Determining that an individual employee was not a ''party'' under the CBA, the court stated the following:

> The agreement, by express terms, permitted the union, not the employee, to invoke the arbitration provisions of the agreement. The only parties named in the agreement under the arbitration provision were the union and the state negotiator, who, respectively, represent the employee and the employer in hearings before arbitrators selected by both parties.

Id. The court concluded that ''unless the collective bargaining agreement provides otherwise, an individual employee may not appeal an unfavorable award where the union expressly determines not to appeal.'' *Id.* at 736.

Such is the case here. Neither Nevada's UAA nor the CBA between the Union and the City defines ''party'' to include individual Union members. In fact, the CBA specifically states that ''[t]his Agreement is made . . . by and between the City . . . and the [Union].'' Moreover, the ''Grievance and Arbitration Procedure'' set forth in the CBA clearly provides that the Union is the ''party'' responsible for filing a grievance and pursuing arbitration.[5]

Because the CBA expressly states that the Union is responsible for pursuing an employee's grievance up to and including arbitration, we conclude that Ruiz was not a ''party'' to the arbitration proceeding. Our conclusion also comports with the restrictive view this court has taken in previous cases in which we have been asked to stretch the boundaries of the term ''party.'' *See, e.g.*, *Valley Bank of Nevada v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) (''This court has consistently taken a restrictive view of those persons or entities that have standing to appeal as parties.''); *Garaventa Co. v. Dist. Court*, 61 Nev. 350, 353-54, 128 P.2d 266, 267-68 (1942) (holding that a corporation did not have standing to appeal an adverse judgment because it was not a named party in the underlying lawsuit). Consequently, we conclude that

[5]The CBA states that ''[t]he Union recognizes its responsibility as bargaining agent and agrees to fairly represent all employees in the bargaining unit.''

the district court correctly determined that Ruiz lacked standing under NRS 38.241 as a ''party'' to the arbitration proceeding.[6]

The Union could not assign its rights to Ruiz

[Headnote 3]

Ruiz next contends that the Union assigned to him its rights under the CBA to further pursue his grievance and that, included within the assigned rights was the ability to challenge the arbitration decision in district court. It is undisputed that the Union attempted to assign its rights to Ruiz. The district court, however, concluded that the rights were not assignable, because to permit such assignments would violate public policy. As explained below, we agree with the district court's rationale, because enabling the assignment of certain CBA rights would undermine the entire purpose for union representation and collective bargaining.

As a general matter, collective bargaining agreements are contractual by nature. 20 Richard A. Lord, *Williston on Contracts* § 55:3 (4th ed. 2001). A union, acting under the authority conferred upon it by all its members, enters into a contract with the members' employer in which both union and employer agree to abide by certain rules and procedures. Indeed, the CBA at issue here expressly states what is obviously necessary in this three-way relationship: ''[t]he Union recognizes its responsibility as bargaining agent and agrees to fairly represent all employees in the bargaining unit.'' *See* NRS 288.160(2) (granting status of ''exclusive bargaining agent'' to any union that represents a majority of the employees in a particular bargaining unit—*e.g.*, nonsupervisory peace officers employed by the City of North Las Vegas).

[Headnote 4]

Given the contractual relationship that a CBA creates between the union and the employer, the assignability of the union's rights is appropriately analyzed under traditional principles of contract law. While we recognize the general rule that contracts are freely assignable in the absence of language to the contrary, an assignment that has the effect of increasing the nonassigning party's ob-

[6]Although an employee generally will not be considered a ''party'' to an arbitration proceeding capable of challenging the arbitrator's decision in court, we note that such an aggrieved employee is not wholly without recourse. If the employee can demonstrate that the union has violated its duty of fair representation in handling the employee's grievance, the employee may have a cause of action against his or her union. *Rosequist v. Int'l Ass'n of Firefighters*, 118 Nev. 444, 448-49, 49 P.3d 651, 653-54 (2002) (holding that a union member seeking to challenge whether his union fulfilled its duty of fair representation must file a claim with Nevada's Employee-Management Relations Board), *abrogated on other grounds by Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007).

ligations or risks under the contract is prohibited. *HD Supply Facilities Maint. v. Bymoen*, 125 Nev. 200, 204, 210 P.3d 183, 186 (2009) (''[T]he basic policy in the law of contractual assignments [is to] honor[ ] an obligor's choice to contract with only the original obligee, thereby ensuring that the obligor is not compelled to perform more than his or her original obligation.''); Restatement (Second) of Contracts § 317(2)(a) (1979) (''A contractual right can be assigned unless . . . the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract . . . .'').

[Headnote 5]

With this in mind, we conclude that the Union could not assign to its members the right to challenge an arbitration decision. Nothing in the CBA permits the Union to do so, and assigning to its members the right to seek judicial relief would impose an additional burden on the City, potentially requiring it to expend additional time, money, and resources on litigating an arbitration decision that it had thought would be binding. We conclude that an assignment by the Union of the right to appeal an arbitration decision would materially increase the City's obligations under the CBA. Thus, unless a CBA expressly permits assignment of rights to a union member, we conclude that such an assignment is invalid. *See Dillman v. Town of Hooksett*, 898 A.2d 505, 508 (N.H. 2006) (recognizing that allowing unions to assign their litigation rights under a CBA would undermine the purposes behind collective bargaining laws and thereby violate public policy by potentially requiring the employer to deal directly with numerous individuals—as opposed to their exclusive representative—with varying merit to their complaints, subjecting the employer to greater demand on its public resources than contemplated during negotiations and allowing the union to avoid liability to its members).

Ruiz has standing under NRS 289.120 to seek judicial relief

[Headnote 6]

Ruiz's final argument is that the Peace Officer Bill of Rights statutorily grants individual peace officers standing to challenge an arbitration decision that determines whether violations of those rights occurred. Specifically, he points to NRS 289.120, which governs judicial relief regarding Peace Officer Rights violations:

> Any peace officer aggrieved by an action of the employer of the peace officer in violation of [the Peace Officer Bill of Rights] may, after exhausting any applicable internal grievance procedures, grievance procedures negotiated pursuant to [collective bargaining] and other administrative remedies, apply to

> the district court for judicial relief. If the court determines that the employer has violated a provision of this chapter, the court shall order appropriate injunctive or other extraordinary relief to prevent the further occurrence of the violation and the taking of any reprisal or retaliatory action by the employer against the peace officer.

Ruiz contends that NRS 289.120 grants him standing to individually challenge the arbitration decision because the decision upheld his termination that was based upon information allegedly obtained in violation of his Peace Officer Rights. We agree. Assuming that Ruiz ''exhausted'' any applicable internal or CBA-negotiated grievance procedures, NRS 289.120's plain language grants Ruiz the right to challenge the arbitration decision in district court.

[Headnote 7]

The City contends, however, that Ruiz has not exhausted the CBA-negotiated grievance procedures. Based on the fact that the only question presented to the arbitrator was whether Ruiz had been terminated without just cause, the City maintains that any ancillary questions that might form the basis for this main question were not sufficiently ''grieved'' through each of the CBA's grievance steps. In granting the City's motion to dismiss Ruiz's petition, the district court agreed with the City's rationale, ''reject[ing] Ruiz's assertion that the fact that his firing was grieved *de facto* encompassed all of his grievable issues, including alleged violations of NRS Chapter 289.''

We disagree with the district court's conclusion that a grievance that generically alleges an employee's wrongful termination cannot also encompass specific grievable issues related to the employee's Peace Officer Rights. In its initial grievance, the Union alleged four specific violations of Ruiz's Peace Officer Rights, the most notable of which was the allegation that Ruiz was not provided with any notice that he was going to be questioned about the alleged robbery.[7] Upon submitting the grievance to the arbitrator, the Union again made clear that improper reliance on information obtained in violation of Ruiz's rights contributed to NLVPD's deci-

[7]The Union's grievance expressly alleged that NLVPD had violated NRS 289.060(1)'s requirement that an officer be given 48 hours' notice prior to being interrogated:

> Failure to provide Officer Ruiz at least 48 hours notice prior to questioning by any fellow law enforcement official in regards to any complaint or allegation that Officer Ruiz was engaged in activities which could result in punitive action (e.g. an internal complaint of Unprofessional Conduct) as, according to the Department's own internal documents, Officer Ruiz was not considered a suspect at the time of the contact or initial interview[.]

sion to terminate Ruiz's employment. At both stages in the grievance process, the Union's argument rested upon the alleged Peace Officer Bill of Rights violations. We reject the City's argument that Ruiz did not grieve these particular issues simply because NLVPD and the arbitrator failed to give them ample consideration throughout the grievance process.

Moreover, we note that an aggrieved peace officer would rarely, if ever, have occasion to complain that his or her rights were violated when such violation did not result in some sort of significant discipline. In many cases, if the rights violation never leads to further disciplinary action, the peace officer would have little motivation to request that his or her union seek arbitration. Most CBAs have a screening process to prevent grievances with no risk of disciplinary action from reaching the arbitration stage.[8] With this in mind, we consider it unlikely that a Peace Officer Bill of Rights violation, grieved in the abstract, would reach the arbitration stage on its own. Accordingly, we conclude that Ruiz has exhausted the applicable internal grievance procedures required by NRS 289.120 and that he therefore has standing to challenge the arbitration decision in district court.[9]

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[8]*See* Alan Miles Ruben, *How Arbitration Works* 198-202 (6th ed. 2003) (explaining that an effective collective bargaining agreement will have in place preliminary procedures to dispose of inconsequential grievances well before they reach the arbitration stage). The CBA at issue in this case provides a similar procedure: Step 1 of the ''Grievance Procedure'' requires the Union Grievance Committee to review an employee's complaint, and only ''[i]f it is determined by the Union Grievance Committee that a grievance does exist'' shall the Union then proceed to Step 2 and present the grievance to the employee's Department Chief.

[9]The City also contends that NRS 289.120 only permits the district court to grant *prospective* relief—*i.e.*, to enjoin a peace officer's employer from engaging in future rights violations. Construing the statute in such a manner, however, would produce an absurd result. *California Commercial v. Amedeo Vegas I*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003) (''[W]e are not empowered to construe the statute beyond its plain meaning, unless the law as stated would yield an absurd result.'').

The issues raised in this case provide an apt example: Ruiz was terminated from his job pursuant to an arbitration decision that was based, in part, on evidence allegedly obtained through prohibited interrogations. Enjoining his employer from wrongfully interrogating him in the future provides him with no relief under the statute. If Ruiz's allegations are true, he has already been improperly interrogated, has been terminated, and must deal with his tarnished record when looking for new employment.

Simply put, the Peace Officer Bill of Rights represents the Nevada Legislature's recognition that peace officers, because of the important role they play in maintaining public safety, deserve additional protections that are unavailable to other public employees. *See* Hearing on A.B. 458 Before the Assembly Judiciary Comm., 62d Leg. (Nev., Apr. 12, 1983) (discussing whether peace officers, because of the ''position of trust that they hold,'' should instead be ''held to a higher standard than the average citizen'' rather than receive additional procedural rights); Hearing on A.B. 458 Before the Assembly Judiciary

We therefore reverse the judgment of the district court and remand this matter to the district court for further proceedings consistent with the provisions of NRS 289.120.

DOUGLAS, C.J., and PICKERING, J., concur.

STATE OF NEVADA, EX REL. BOARD OF PAROLE COMMISSIONERS; AND MS. DORLA M. SALLING, CHAIRWOMAN, APPELLANTS, *v.* RICHARD DAVID MORROW, RESPONDENT.

No. 53436

BRIAN KAMEDULA, APPELLANT, *v.* THE STATE OF NEVADA BOARD OF PAROLE COMMISSIONERS, RESPONDENT.

No. 54173

May 26, 2011 255 P.3d 224

Appeal from a district court order clarifying a judgment granting a writ of mandamus (Docket No. 53436), and proper person appeal from a district court order granting a motion to dismiss (Docket No. 54173). Eighth Judicial District Court, Clark County; James M. Bixler, Judge (Docket No. 53436); First Judicial District Court, Carson City; James E. Wilson, Judge (Docket No. 54173).

Inmate filed writ of mandamus, alleging due process violations in connection with Nevada Board of Parole Commissioners' denial of parole. After writ was granted and Parole Board denied parole a second time, the Eighth Judicial District Court issued order clarifying its original writ and directing Parole Board to turn over every document it considered when it denied parole. Parole Board

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Comm., 62d Leg. (Nev., May 11, 1983) (questioning why peace officers deserve rights that are not afforded to other state employees); *see also* Kevin M. Keenan & Samuel Walker, *An Impediment to Police Accountability? An Analysis of Statutory Law Enforcement Officers' Bills of Rights*, 14 B.U. Pub. Int. L.J. 185, 185-87 (2005) (discussing the public-policy considerations behind granting peace officers additional protections that ''[n]o other group of public employees enjoys'').

When our Legislature enacts statutes purporting to grant a group of people certain rights, we will construe the statutes in a manner consistent with the enforceability of those rights. *See Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) (''[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent.'' (internal quotations omitted)). Accordingly, we conclude that the district court is not limited to granting prospective relief under NRS 289.120.

appealed. Another inmate filed complaint after being denied parole, alleging violations of Open Meeting Law and due process. The First Judicial District Court dismissed complaint. That inmate brought proper person appeal. The supreme court, HARDESTY, J., held that: (1) statutory due process protections related to parole release hearings did not apply to inmates in question; (2) Nevada inmates do not have a protectable liberty interest at parole release hearings, as necessary for constitutional due process protections to apply; and (3) judicial function test applies in Nevada when determining whether entities act in a quasi-judicial manner when performing their administrative duties.

Reversed (Docket No. 53436); affirmed (Docket No. 54173).

[Rehearing denied July 13, 2011]

[En banc reconsideration denied September 20, 2011]

Catherine Cortez Masto, Attorney General, and *Cynthia R. Hoover* and *Binu G. Palal*, Deputy Attorneys General, Carson City, for the State of Nevada Board of Parole Commissioners and Dorla M. Salling.

Richard David Morrow, Lovelock, in Proper Person.

Brian Kamedula, Carson City, in Proper Person.

1. CRIMINAL LAW.
   The supreme court reviews legal questions de novo.
2. PARDON AND PAROLE.
   Statutory due process protections related to parole release hearings did not apply to parole release hearings for two inmates, when one inmate's hearing occurred before Legislature enacted those protections and other inmate's hearing occurred during Legislature's temporary suspension of the protections. NRS 213.130.
3. CONSTITUTIONAL LAW; PARDON AND PAROLE.
   Nevada inmates do not have a protectable liberty interest at parole release hearings, as necessary for constitutional due process protections to apply; Nevada's parole statute is purely discretionary and thus creates no expectation of release before expiration of sentence. Const. art. 1, § 8; U.S. CONST. amend. 14; NRS 213.130, 213.1099(1).
4. CONSTITUTIONAL LAW.
   Constitutional due process protections apply only when government action deprives a person of liberty or property. Const. art. 1, § 8; U.S. CONST. amend. 14.
5. ADMINISTRATIVE LAW AND PROCEDURE.
   Judicial function test is a means of determining whether an administrative proceeding is quasi-judicial by examining the hearing entity's function; same judicial function test is used to determine quasi-judicial immunity from liability.
6. ADMINISTRATIVE LAW AND PROCEDURE.
   If the hearing entity's function is judicial in nature, its acts qualify as quasi-judicial; determining whether an administrative proceeding is quasi-

judicial is an imprecise exercise because many different types of entities perform judicial functions.

7. ADMINISTRATIVE LAW AND PROCEDURE.
   Judicial function test applies in Nevada when determining whether a hearing entity acted in a quasi-judicial manner when performing its administrative duties.

8. ADMINISTRATIVE LAW AND PROCEDURE.
   When the judicial function test is utilized to determine whether an administrative proceeding is quasi-judicial, the due process protections afforded during a proceeding do not, alone, determine whether it is quasi-judicial; instead, whether procedural protections are afforded during the proceeding goes to the ability of the hearing entity to hear witnesses and make a decision affecting property rights and is but one consideration in determining whether the hearing entity is performing a judicial function. Const. art. 1, § 8; U.S. CONST. amend. 14.

9. CONSTITUTIONAL LAW; PARDON AND PAROLE.
   Inmate, to whom statutory due process protections with respect to parole release hearing did not apply, also lacked a constitutional due process right to be provided by state with a copy of every document Parole Board considered when denying inmate parole; inmate had no protectable liberty interest in being released before completion of sentence. Const. art. 1, § 8; U.S. CONST. amend. 14; NRS 213.130, 213.1099(1).

10. CONSTITUTIONAL LAW; PARDON AND PAROLE.
    Inmate did not have constitutional due process right at parole release hearing to present certain evidence, to cross-examine witnesses during the hearing, or to be provided by Parole Board with a written decision or the ability to appeal. Const. art. 1, § 8; U.S. CONST. amend. 14; NRS 213.130, 213.1099(1).

Before DOUGLAS, C.J., PICKERING and HARDESTY JJ.

OPINION

By the Court, HARDESTY, J.:

In the two cases below, the district courts reached different conclusions regarding whether inmates are entitled to due process protections related to their parole release hearings. In considering that issue on appeal, we recognize that no statutory due process protections applied in these particular cases, and we conclude that, because the possibility of release on parole is not a protectable liberty interest, inmates are not entitled to constitutional or inherent due process rights regarding discretionary parole release. We clarify that *Stockmeier v. State, Department of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), does not create due process rights related to parole release hearings, and as a result of the confusion stemming from that case, we explicitly adopt and further explain the judicial function test for determining whether a proceeding is quasi-judicial.

FACTS

Morrow appeal

Proper person respondent Richard David Morrow pleaded guilty to several sex offenses in 1990 and was sentenced to life in prison with the possibility of parole. In October 2006, Morrow was certified as not being at high risk to reoffend by the Psychological Review Panel[1] and granted parole, effective in February 2007. Before being released, however, the Psychological Review Panel assessed him as a Tier III sex offender. This reclassification precluded Morrow from being released pursuant to NRS 213.1214(1). Due to the new assessment and other expressed concerns, in April 2007, the Nevada Board of Parole Commissioners (the Parole Board) reconsidered its decision to release Morrow on parole. The Parole Board ultimately decided to defer his parole for two years.

In June 2007, Morrow challenged the Parole Board's procedure by filing a writ of mandamus in the district court seeking a new parole hearing, with proper notice, and a directive that the Parole Board provide to him copies of all of the documents in his parole file and all of the documents the Parole Board considered when it denied his parole. In his petition, Morrow argued that the Parole Board violated his due process rights because it did not notify him of the reconsideration hearing until five minutes before it began and denied his access to the documents it relied on in deferring parole.

The district court granted the writ and directed that (1) Morrow receive a new parole hearing; (2) the Parole Board provide him with proper notice of the hearing and the opportunity to speak or have a representative speak on his behalf; and (3) the Parole Board provide him with a copy of his risk assessment file, excluding confidential information relating to the victim. Following the court's directive, the Parole Board delivered Morrow's risk assessment file to him and held a new hearing in November 2008, resulting in another denial of parole. Morrow then sought in the district court an order to show cause why the Parole Board should not be held in contempt, arguing that the Parole Board did not comply with the district court's writ because it failed to provide Morrow with proper notice of the November 2008 parole hearing and copies of *all* of the documents that the Parole Board considered in denying him parole. The district court denied Morrow's request for an order to show cause but subsequently issued an order clarifying its original writ and directing the Parole Board to turn over every document it considered when it denied Morrow parole, including his parole file. Without citing any authority, the district court reasoned

[1]Pursuant to NRS 213.1214(1), an inmate convicted of certain sex offenses shall not be released on parole until the Psychological Review Panel determines that he ''does not represent a high risk to reoffend.''

that due process required that Morrow receive all the documents and the exact information that the Parole Board considered when it denied him parole. The Parole Board now appeals.

Kamedula appeal

Kamedula was convicted of sexual assault in 1987 and sentenced to life in prison with the possibility of parole. In September 2008, the Parole Board held a hearing and denied Kamedula parole. Kamedula subsequently filed a complaint in the district court, arguing that the Parole Board violated the Open Meeting Law, and later amended the complaint to add claims that the Parole Board denied him certain due process rights, including the ability to present certain evidence and the ability to cross-examine witnesses during the hearing, and it also failed to provide him with a written decision or the ability to appeal. He further claimed that the Parole Board violated former NRS 213.130, as amended in 2007, by failing to afford him the due process protections set forth therein.[2] The Parole Board moved to dismiss the complaint under NRCP 12(b)(5), arguing that the Open Meeting Law did not apply to parole release hearings pursuant to *Witherow v. State, Board of Parole Commissioners*, 123 Nev. 305, 167 P.3d 408 (2007), and that the asserted procedural protections of former NRS 213.130 did not apply at the time of Kamedula's parole hearing. The district court concluded that neither the Open Meeting Law nor the statutory due process protections of former NRS 213.130 applied to Kamedula's Parole Board hearing and dismissed the complaint. Kamedula now appeals.

[Headnote 1]

These appeals raise solely legal questions, which we review de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

DISCUSSION

[Headnote 2]

Although inmates in Nevada are currently afforded statutory due process protections related to parole release hearings, those protections did not apply to Morrow's and Kamedula's parole hearings. In June 2007, the Legislature amended NRS 213.130 to provide minimum procedural due process protections related to those proceedings, 2007 Nev. Stat., ch. 528, § 10.5, at 3261-62; S.B. 471, 74th Leg. (Nev. 2007), but suspended those protections

[2]The protections Kamedula claims he was not given include: notice of the Parole Board hearing, an opportunity to attend the hearing or have a representative speak at the hearing on his behalf, and timely notice of the decision or ''any specific recommendations for improvement.''

in June 2008. 2008 Nev. Stat., ch. 6, § 1, at 5-7; S.B. 4, 24th Special Sess. (Nev. 2008). For reasons unrelated to the due process protections, on October 7, 2008, the United States District Court for the District of Nevada permanently enjoined enforcement of the provisions included in A.B. 579 and S.B. 471, passed during the 2007 legislative session, which included the amendments made to NRS 213.130, as well as changes to several other statutes. *Am. Civil Liberties Union v. Cortez Masto*, 719 F. Supp. 2d 1258, 1260 (D. Nev. 2008). During the 2011 legislative session, the Legislature reenacted the due process protections of NRS 213.130 enjoined by *Cortez Masto*. 2011 Nev. Stat., ch. 23, § 3, at 67. Assembly Bill 18, section 3(9)-(10) amended NRS Chapter 213 such that inmates must now be provided with notice and the right to attend the hearing, have representation, and speak on his or her behalf. *Id.*

Because Morrow's hearing occurred in April 2007, before the Legislature amended former NRS 213.130, and Kamedula's hearing occurred in September 2008, during the Legislature's temporary suspension of the statute's due process protections, those statutory due process protections did not apply to their respective hearings. Therefore, our analysis is limited to whether Morrow and Kamedula should have been afforded constitutional or inherent due process protections during their parole release hearings.

Morrow and Kamedula argue that such protections exist, particularly in light of prior decisional law concluding that the Parole Board is a quasi-judicial body, *Witherow v. State, Bd. of Parole Comm'rs*, 123 Nev. 305, 311-12, 167 P.3d 408, 412 (2007), and discussing the due process protections afforded in quasi-judicial proceedings, *Stockmeier v. State, Dep't of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008). We acknowledge that, in Nevada, constitutional due process rights do not attach to parole release hearings because no liberty interest is at stake, and we take this opportunity to clarify that our analysis of quasi-judicial proceedings in *Stockmeier* did not create due process rights where no liberty interest exists. In doing so, we also expressly adopt, and clarify the proper application of, the judicial function test for determining whether a proceeding is quasi-judicial.

Due process rights do not apply to parole release hearings in Nevada

Constitutional due process

[Headnotes 3, 4]

Both ''[t]he United States and Nevada Constitutions provide that no person shall be deprived of liberty without due process of

law.'' *Scarbo v. Dist. Ct.*, 125 Nev. 118, 124, 206 P.3d 975, 979 (2009); *see also* Nev. Const. art. 1, § 8. However, those due process protections apply only ''when government action deprives a person of liberty or property.'' *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7 (1979). Therefore, for Morrow and Kamedula to be entitled to constitutional due process protections during their parole release hearings, they must have a protectable liberty interest at stake in those proceedings.

In *Greenholtz*, the United States Supreme Court held that ''[t]here is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence. . . . [T]he conviction, with all its procedural safeguards, has extinguished that liberty right.'' *Id.* However, the Supreme Court noted that a state may create an ''expectancy of release . . . entitled to some measure of constitutional protection'' by the language used in its statutory scheme. *Id.* at 12.

This court has recognized on several occasions that Nevada's parole statute is purely discretionary and thus creates no expectation of release. NRS 213.1099(1) states, ''Except as otherwise provided in this section . . . , the Board *may* release on parole a prisoner who is otherwise eligible for parole pursuant to NRS 213.107 to 213.157, inclusive, and section 3 of [Assembly Bill 18].''[3] (Emphasis added.) We have consistently pointed out that this discretionary language does not create a protectable liberty interest sufficient to invoke the Due Process Clause. *See Weakland v. Bd. of Parole Comm'rs*, 100 Nev. 218, 220, 678 P.2d 1158, 1160 (1984) (recognizing *Greenholtz* and holding that because ''NRS 213.1099 does not create a constitutionally cognizable liberty interest sufficient to invoke the protections of the Due Process Clause, it follows that the Board is not constitutionally required to render any statement of reasons why parole is denied''); *Severance v. Armstrong*, 96 Nev. 836, 839, 620 P.2d 369, 370 (1980) (recognizing *Greenholtz* and rejecting appellant's argument that the Parole Board violated his due process rights in denying his parole application; holding that ''NRS 213.1099 does not confer a legitimate expectation of parole release and therefore does not create a constitutionally cognizable liberty interest sufficient to invoke due process''), *reh'g denied*, 97 Nev. 95, 96, 624 P.2d 1004, 1005 (1981) (recognizing that the statement in *Goldsworthy v. Hannifin*, 86 Nev. 252, 468 P.2d 350 (1970), that legislative acts of grace, such as the right to apply for parole, must be administered in accordance with due process, does not ''mean that due process rights attach to all parole statutes'').

[3]The Legislature amended NRS 213.1099(1) during the 2011 legislative session to include the amendments made by Assembly Bill 18, section 3, which reenacted statutory due process protections related to Parole Board hearings. 2011 Nev. Stat., ch. 23, § 5, at 67-68.

Instead, Nevada's parole statute ''only gives rise to a 'hope' of release on parole.'' *Weakland*, 100 Nev. at 219-20, 678 P.2d at 1160. As the Legislature has provided, release on parole is ''an act of grace of the State,'' and ''it is not intended that the establishment of standards relating [to parole] create any such right or interest in liberty or property or establish a basis for any cause of action against the State, its political subdivisions, agencies, boards, commissions, departments, officers or employees.'' NRS 213.10705. Accordingly, because Nevada's parole release statute does not create a liberty interest, we reiterate that inmates are not entitled to constitutional due process protections with respect to parole release hearings. While it is clear that Nevada's statutes do not create a liberty interest sufficient to afford any guaranteed due process protections during a parole release proceeding, we next examine Morrow's and Kamedula's argument that recent caselaw affords such guaranteed protections.

Stockmeier v. State, Department of Corrections

Morrow and Kamedula argue on appeal that our holding in *Stockmeier v. State, Department of Corrections*, 122 Nev. 385, 135 P.3d 220 (2006), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6, 181 P.3d 670, 672 n.6 (2008), recognizes due process protections necessary or inherent in quasi-judicial proceedings like parole release hearings.[4] In *Stockmeier*, we examined whether Psychological Review Panel hearings are exempt from Nevada's Open Meeting Law pursuant to the judicial proceeding exception in NRS 241.030(4)(a).[5] 122 Nev. at 390, 135 P.3d at 223. To resolve this issue, we first determined that the judicial proceeding exemption extended to quasi-judicial proceedings and then explained that quasi-judicial proceedings ''are those having a judicial character that are performed by administrative agencies.'' *Id*. In discussing whether administrative proceedings have a ''judicial character,'' we focused on whether the proceedings maintained trial-like attributes. In so doing, we in-

[4]In *Witherow v. State, Board of Parole Commissioners*, 123 Nev. 305, 311-12, 167 P.3d 408, 412 (2007), we held that because the Parole Board performs a judicial function when determining parole status and because the Legislature so intended, parole release hearings are quasi-judicial. *See also Raggio v. Campbell*, 80 Nev. 418, 423, 395 P.2d 625, 627 (1964). We also noted that when the Legislature amended NRS 213.130(3) in 2007, it specifically confirmed that Parole Board hearings are quasi-judicial. *See Witherow*, 123 Nev. at 310, 167 P.3d at 410-11; 2007 Nev. Stat., ch. 528, § 10.5, at 3261. When the Legislature reenacted the provisions of former NRS 213.130 in 2011, it again maintained that Parole Board hearings are quasi-judicial. 2011 Nev. Stat., ch. 23, § 3, at 66.

[5]NRS 241.030(4)(a) states that the Open Meeting Law does not ''[a]pply to judicial proceedings.''

extricably linked quasi-judicial proceedings to four due process rights:

> At a minimum, a quasi-judicial proceeding must afford each party (1) the ability to present and object to evidence, (2) the ability to cross-examine witnesses, (3) a written decision from the public body, and (4) an opportunity to appeal to a higher authority.

Id. at 391-92, 135 P.3d at 224. Based on those due process considerations, we held that Psychological Review Panel hearings did not afford each of those due process rights and were therefore not quasi-judicial. *Id.* at 392, 135 P.3d at 224-25.

Referring to that holding, Morrow and Kamedula argue that the converse must also be true: if a proceeding is quasi-judicial, it must provide due process protections. Thus, they assert, because parole release hearings are quasi-judicial, those hearings must necessarily afford the due process protections enumerated in *Stockmeier*. We disagree.

Because the issue in *Stockmeier* concerned whether an exception to the Open Meeting Law applied, our opinion in that case highlighted the similarities between the Open Meeting Law and the due process protections afforded in judicial proceedings as a means of differentiating proceedings subject to the Open Meeting Law from those quasi-judicial proceedings that are exempt from those laws because the protections that they afford serve a similar purpose. *Id.* at 391, 135 P.3d at 224. Inasmuch as *Stockmeier* implies that inmates have inherent due process protections arising from the quasi-judicial status of parole release hearings, we reject that implication. *Stockmeier* did not create due process rights where no liberty interest exists. Nonetheless, as the quoted language in *Stockmeier* has caused some confusion about the nature of quasi-judicial proceedings in Nevada, we take this opportunity to expressly adopt and clarify the application of the judicial function test in this state.

The judicial function test

[Headnotes 5-7]

The judicial function test is a means of determining whether an administrative proceeding is quasi-judicial by examining the hearing entity's function.[6] *See Witherow*, 123 Nev. at 312, 167 P.3d at 412; *id.* at 314, 167 P.3d at 412-14 (HARDESTY, J., concurring and dissenting). If the hearing entity's function is judicial in nature, its acts qualify as quasi-judicial. *Id.* In determining whether a hearing entity's function is judicial, other jurisdictions consider whether

[6]The same judicial function test is also used to determine quasi-judicial immunity from liability. *See Witherow*, 123 Nev. at 311-12, 167 P.3d at 412.

the hearing entity has authority to: '' '(1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide; (3) make binding orders and judgments; (4) affect the personal property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties.' '' *Craig v. Stafford Const., Inc.*, 856 A.2d 372, 377 (Conn. 2004) (quoting *Kelley v. Bonney*, 606 A.2d 693, 703 (Conn. 1992), and considering, also, whether a sound policy basis exists for protecting the hearing entity from suit).[7] These factors are not exclusive, and determining whether a proceeding is quasi-judicial is an imprecise exercise because many different types of entities perform judicial functions. *Id.* We have previously used the judicial function test in this state to determine whether entities act in a quasi-judicial manner when performing their administrative duties,[8] and we now expressly adopt the judicial function test for doing so in the future.

[Headnote 8]

When considering whether Psychological Review Panel hearings are quasi-judicial and thus exempt from the Open Meeting Law in *Stockmeier*, this court signaled that it was applying the judicial function test, stating that ''[q]uasi-judicial proceedings are those proceedings having a judicial character.'' 122 Nev. at 390, 135 P.3d at 223. We then indicated that a quasi-judicial proceeding is one that provides minimum due process protections, implying that this was necessary regardless of any other considerations of judicial character. *Id.* at 391-92, 135 P.3d at 224. We now clarify that when utilizing the judicial function test, the due process protections afforded during a proceeding do not, alone, determine whether it is quasi-judicial; instead, whether procedural protections are afforded during the proceeding goes to the ability of the hearing entity to hear witnesses and make a decision affecting property rights and is but one consideration in determining whether the hearing entity is performing a judicial function. *See Raggio*, 80 Nev. at 423, 395 P.2d at 627.

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[7]*See also Ascherman v. Natanson*, 100 Cal. Rptr. 656, 659 (Ct. App. 1972) (''The primary factors which determine the nature of the proceedings are: (1) whether the administrative body is vested with discretion based upon investigation and consideration of evidentiary facts, (2) whether it is entitled to hold hearings and decide the issue by the application of rules of law to the ascertained facts and, more importantly (3) whether its power affects the personal or property rights of private persons.'').

[8]*See, e.g.*, *Marvin v. Fitch*, 126 Nev. 168, 232 P.3d 425 (2010) (determining that the State Board of Equalization performed quasi-judicial functions and thus was entitled to immunity); *Witherow*, 123 Nev. at 312, 167 P.3d at 412; *Raggio v. Campbell*, 80 Nev. 418, 423, 395 P.2d 625, 627 (1964) (holding that parole boards perform a quasi-judicial function when releasing prisoners on parole).

To hold that any proceeding that provides minimum due process protections is quasi-judicial and that, therefore, any quasi-judicial proceeding must afford certain specified due process protections, as Morrow and Kamedula ask us to do, would render all proceedings in which the participants are given notice and an opportunity to be heard quasi-judicial, even if the supervising official can undertake no judicial function. For example, county boards of commissioners, the Public Utilities Commission, the Board of Architecture, and other entities could claim that they are quasi-judicial simply by affording the protections enumerated in *Stockmeier*. *See Witherow*, 123 Nev. at 314, 167 P.3d at 413 (HARDESTY, J., concurring and dissenting) (stating that ''defining quasi-judicial proceedings as any that provide due process protections . . . creates an absurd result by permitting public bodies to easily circumvent the Open Meeting Law''). We decline to adopt this approach, as this would be an improper application of the judicial function test and would create an absurd result with significant implications beyond Parole Board hearings. Accordingly, *Stockmeier* neither created any new nor recognized any inherent due process rights, and Morrow's and Kamedula's arguments in that regard fail.

CONCLUSION

[Headnotes 9, 10]

No statutory due process protections applied during Morrow's and Kamedula's parole hearings, and because Nevada's parole release statute does not create a liberty interest sufficient to invoke due process protections, we conclude that inmates are not entitled to constitutional due process protections regarding discretionary parole release. We clarify that *Stockmeier* did not create or recognize due process rights where no liberty interest exists, and thus, the Parole Board is not required to afford inmates the due process protections enumerated in *Stockmeier*. Therefore, for the reasons discussed above, we conclude that in the *Morrow* appeal, the district court abused its discretion in requiring the State to provide Morrow with a copy of every document the Parole Board considered when it denied him parole. We further conclude that the district court properly dismissed Kamedula's complaint because he failed to state a claim against the Parole Board upon which relief may be granted. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672.

Accordingly, we reverse the clarification order of the district court in the *Morrow* appeal, Docket No. 53436, and we affirm the order of the district court in the *Kamedula* appeal, Docket No. 54173.

DOUGLAS, C.J., and PICKERING, J., concur.

SOUTHERN CALIFORNIA EDISON, PETITIONER, *v.* THE FIRST JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR CARSON CITY, AND THE HONORABLE JAMES TODD RUSSELL, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, DEPARTMENT OF TAXATION, REAL PARTY IN INTEREST.

No. 55228

May 26, 2011 255 P.3d 231

Original petition for a writ of mandamus challenging a district court order determining that a use tax refund matter should proceed as a petition for judicial review under NRS Chapter 233B, rather than as an independent action.

After Nevada Tax Commission denied taxpayer's claims for refunds of use taxes, taxpayer filed action for refund. The district court ordered the action to proceed as a petition for judicial review under the Administrative Procedures Act (APA), rather than as an independent action. Taxpayer filed petition for writ of mandamus. The supreme court, DOUGLAS, C.J., held that: (1) judicial review under the APA is the exclusive means of proceeding with a tax refund claim; (2) a petition for judicial review under the APA is the sole remedy after a final decision by Tax Commission in regard to a sales and use tax refund matter; but (3) Department of Taxation was judicially estopped from asserting that a petition for judicial review was the sole remedy, and thus taxpayer's refund claims could proceed as a trial de novo.

Petition granted.

[Rehearing denied September 20, 2011]

Norman J. Azevedo, Carson City; *O'Melveny & Myers LLP* and *Charles C. Read, Christopher W. Campbell*, and *Ryan M. Austin*, Los Angeles, California, for Petitioner.

Catherine Cortez Masto, Attorney General, and *Gina C. Session*, Chief Deputy Attorney General, Carson City, for Real Party in Interest.

David J. Roger, District Attorney, and *Paul D. Johnson*, Deputy District Attorney, Clark County, for Amicus Curiae Clark County.

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, and *William L. Keane*, Senior Principal Deputy Legislative Counsel, Carson City, for Amicus Curiae Legislature of the State of Nevada.

McDonald Carano Wilson LLP and *Debbie Leonard* and *Jeffrey A. Silvestri*, Las Vegas, for Amici Curiae Nevada Taxpayers Association, Nevada Manufacturers Association, and Council on State Taxation.

1. TAXATION.
   Judicial review under the Administrative Procedures Act is the exclusive means of proceeding with a tax refund claim. NRS 233B.130(6), 360.245(5).
2. MANDAMUS.
   The supreme court may issue a writ of mandamus to compel the performance of an act that the law requires as a duty resulting from an office or when discretion has been manifestly abused or exercised arbitrarily or capriciously. NRS 34.160.
3. MANDAMUS.
   A writ of mandamus will not issue when the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.
4. MANDAMUS.
   A writ of mandamus is an extraordinary remedy; therefore, the supreme court's decision to entertain a petition for a writ of mandamus is discretionary.
5. MANDAMUS.
   In determining whether mandamus relief is available and appropriate, the supreme court will consider, among other things, whether the petition raises an important issue of law that requires clarification.
6. MANDAMUS.
   Petitioner bears the burden of demonstrating that mandamus relief is warranted.
7. APPEAL AND ERROR.
   The supreme court reviews questions of law de novo.
8. TAXATION.
   Statute allowing claimants to bring an action in the district court after a final decision on a claim for a sales and use tax refund is rendered by the Tax Commission contemplates judicial review in accordance with the Administrative Procedures Act. NRS 233B.130, 372.680.
9. TAXATION.
   A petition for judicial review under the Administrative Procedures Act is the sole remedy after a final decision by the Tax Commission in regard to a sales and use tax refund matter. NRS 233B.130, 233B.135, 372.680.
10. ESTOPPEL.
    Although the proper means of seeking review of Tax Commission's decision denying taxpayer's claims for refunds of use taxes was by means of a petition for judicial review, Nevada Department of Taxation was judicially estopped from asserting that a petition for judicial review was the sole remedy, and thus taxpayer's refund claims could proceed as a trial de novo, where Department had specifically told taxpayer that trial de novo would be available if taxpayer was unhappy with Tax Commission's decision; nothing suggested that Department's original position was due to ignorance, fraud, or mistake, and it would have been highly inequitable to allow Department to change its position with respect to taxpayer. NRS 233B.130, 233B.135, 372.680.

11. ESTOPPEL.
    Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by intentional wrongdoing or an attempt to obtain an unfair advantage.
12. ESTOPPEL.
    The supreme court may invoke the doctrine of judicial estoppel at its discretion.
13. ESTOPPEL.
    Judicial estoppel does not preclude a change in position that is not intended to sabotage the judicial process.
14. ESTOPPEL.
    Judicial estoppel may apply when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, C.J.:

In this writ proceeding, we are asked to clarify the proper method of challenging the refund claim decisions of the Nevada Tax Commission. Specifically, the parties dispute whether such challenges should be through an independent civil action in which the district court's review is de novo, or through a petition for judicial review, which provides for a more deferential review of the Commission's decision. While we conclude that a petition for judicial review is the proper vehicle for challenging the Commission's decisions on claims for sales and use tax refunds, the Nevada Department of Taxation is judicially estopped from requesting that the claimant here proceed in such a manner, and thus, mandamus relief is appropriate.

In this case, after the Nevada Tax Commission denied petitioner Southern California Edison's claims for refunds of use taxes, Edison filed a complaint in district court, seeking relief under NRS 372.680. The district court ordered that the matter would proceed on the administrative record as a petition for judicial review pursuant to the Administrative Procedures Act (APA), codified in NRS Chapter 233B. Edison thus has filed the instant writ petition, asking this court to determine that the APA does not apply because NRS 372.680 allows for trial de novo. Edison requests that this court issue a writ of mandamus ordering the district court to treat Edison's complaint as an independent civil action or provide other appropriate relief.

[Headnote 1]

We conclude that the APA applies to sales and use tax refund claims. Although NRS 372.680 allows claimants to ''bring an action'' in the district court and our prior decisions, including *Saveway v. Cafferata*, 104 Nev. 402, 760 P.2d 127 (1988), suggested that claimants receive a trial de novo there, the APA and general tax statutes were subsequently amended in a manner demonstrating that judicial review under the APA is now the exclusive means of proceeding with a refund claim. Therefore, when taxpayers challenge the Commission's decision on sales and use tax refund claims, the matter is subject to judicial review pursuant to the APA. NRS 372.680 permits a taxpayer to challenge the Commission's decision by filing an action; pursuant to NRS 233B.130, that action must be a petition for judicial review. However, in this case, real party in interest, the Nevada Department of Taxation, is judicially estopped from asserting that a petition for judicial review is the sole remedy because it specifically told Edison that trial de novo would be available if Edison was unhappy with the Commission's decision. Therefore, although we hold that the APA applies to sales and use tax refund claims, in this instance, we conclude that the district court erred when it ordered the action to proceed as a petition for judicial review, and we grant Edison's petition for a writ of mandamus.

PROCEDURAL HISTORY AND FACTS

Edison filed with the Department several claims for refunds of use taxes it paid between March 1998 and December 2000. The Department denied those claims, and Edison appealed to the Commission. The claims were consolidated, and an administrative law judge upheld the Department's denial of Edison's requested refunds. Edison then appealed the administrative law judge's decision to the Commission.

Ultimately, the Commission voted to deny Edison's claims and later issued a written decision doing so.[1] Edison filed a complaint in district court seeking trial de novo for its refund claim. The Department filed a motion to dismiss, arguing that Edison should have filed a petition for judicial review under the APA, not a complaint. Following a hearing and subsequent briefing on whether the APA applied, the district court ordered that, even

[1]The Commission originally granted Edison's tax refund claims during a closed session. This court reversed the Commission's decision because the Commission had violated Nevada's Open Meeting Law. *Attorney General v. Nevada Tax Comm'n*, 124 Nev. 232, 244-45, 181 P.3d 675, 683 (2008). The Commission subsequently conducted new hearings in open session, which led to the decision denying the claims.

though Edison had filed a complaint rather than a petition for judicial review, the matter would proceed under the APA's judicial review standards. The district court concluded that ''NRS Chapter 233B applies to all administrative agencies within the state unless exempt. The [Department] and the [Commission] are not exempt from the provisions of NRS Chapter 233B. NRS 233B.039. All decisions by the Commission are therefore subject to NRS 233B.130(6).''

The district court stayed the proceedings pending resolution of the instant petition for a writ of mandamus challenging the district court's decision.

DISCUSSION

Edison argues that NRS 372.680 applies to its tax refund claim and that the proper proceeding under that statute is a civil action in district court, proceeding as trial de novo. Edison argues that the judicial review standard in the APA is inapplicable and petitions this court to issue a writ of mandamus compelling the district court to treat its complaint as an independent civil action.

[Headnotes 2-7]

''This court may issue a writ of mandamus to compel the performance of an act which the law requires as a duty resulting from an office or where discretion has been manifestly abused or exercised arbitrarily or capriciously.'' *Redeker v. Dist. Ct.*, 122 Nev. 164, 167, 127 P.3d 520, 522 (2006); *see also* NRS 34.160. ''The writ does not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law.'' *Redeker*, 122 Nev. at 167, 127 P.3d at 522; *see also* NRS 34.170. A writ of mandamus is an extraordinary remedy; therefore, a court's decision to entertain a petition for a writ of mandamus is discretionary. *Hickey v. District Court*, 105 Nev. 729, 731, 782 P.2d 1336, 1338 (1989). In determining whether writ relief is available and appropriate, we will consider, among other things, whether the petition raises an important issue of law that requires clarification. *Redeker*, 122 Nev. at 167, 127 P.3d at 522. It is the petitioner's burden to demonstrate that such relief is warranted. *American Home Assurance Co. v. Dist. Ct.*, 122 Nev. 1229, 1234, 147 P.3d 1120, 1124 (2006). Furthermore, we review questions of law de novo. *Saylor v. Arcotta*, 126 Nev. 92, 95, 225 P.3d 1276, 1278 (2010); *State, Div. of Insurance v. State Farm*, 116 Nev. 290, 293, 995 P.2d 482, 484 (2000).

Edison argues that the nature of the judicial remedy available in a tax refund action is an important issue of law requiring clarification. Edison argues that the Department has taken inconsistent positions from one case to the next, and that this court should ensure that all taxpayers are treated with uniformity and consistency. According to Edison, there are multiple cases that are working

their way through the administrative appeals process and that have been filed in district court that will require district courts throughout the state to determine the appropriate standard of review and procedural posture for refund cases. Edison argues that we should definitively clarify the law so that all of those cases are treated equally.

It appears that the Department has adopted a new policy for refund cases. The Department and the Attorney General's office admitted at oral argument that, in the past, they had advised some taxpayers who contested the denial of a refund that trial de novo before the district court would be available. They also admitted that there was no consistent position taken regarding whether a taxpayer is entitled to trial de novo or a petition for judicial review. In one case, an administrative law judge stated in a letter that: ''[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time.'' However, in its answer to the writ petition, the Department states that ''going forward, [it] is challenging refund actions filed as civil actions in district court after an administrative proceeding.''

Given this change in the Department's approach to refund actions, and the resulting confusion and potential disparate application of the law, we take this opportunity to clarify the proper procedure when a taxpayer challenges a Commission decision in a refund action.[2]

Whether a taxpayer can file a complaint in district court or is required to petition for judicial review when challenging a decision of the Commission

In an action for refund, there appears to be two applicable statutes governing the nature of the action: NRS 372.680 and NRS Chapter 233B, specifically NRS 233B.130 and 233B.135. These statutes seem to require different types of proceedings. In *Saveway*, we held that a statute similar to NRS 372.680 provided for trial de novo. 104 Nev. at 404-05, 760 P.2d at 128-29. NRS Chapter 233B, however, provides for a more deferential standard of review for the commission's decision. NRS 233B.135.

As currently drafted, NRS 372.680 establishes a right of action against the Department for the recovery of a disallowed refund claim and reads:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by the Nevada Tax Commission, the claimant may bring an action against the Department on the grounds set forth in the claim in a court of

[2]We note that during oral argument, the parties indicated that there seems to be confusion at the district court level as to whether NRS Chapter 233B applies or whether NRS 372.680 applies.

> competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring an action within the time specified constitutes a waiver of any demand against the State on account of alleged overpayments.

NRS 372.680, however, does not define the nature of the action to be brought against the department.

In *Saveway*, this court recognized that prior caselaw regarding a statutory refund claim ''certainly implies that *the burden is not that of showing a lack of substantial evidence*, rather, it is to support the elements of an *independent action* for restitution.'' 104 Nev. at 404, 760 P.2d at 128 (emphases added). However, NRS Chapter 233B and NRS 372.680 have both been amended since this court decided *Saveway*, and we reconsider the nature of the action for a refund claim.

NRS 233B.130 provides for judicial review of an agency's decision. Additionally, included in the APA is a statement of legislative intent, which reads:

> 1. By this chapter, the Legislature intends to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies of the Executive Department of the State Government and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter. This chapter confers no additional regulation-making authority upon any agency except to the extent provided in subsection 1 of NRS 233B.050.
>
> 2. The provisions of this chapter are intended to supplement statutes applicable to specific agencies. This chapter does not abrogate or limit additional requirements imposed on such agencies by statute or otherwise recognized by law.

NRS 233B.020.

NRS 233B.039 sets out which agencies are completely exempt from the application of NRS Chapter 233B. It also specifically enumerates the statutory provisions that prevail over the provisions of NRS Chapter 233B. The Department of Taxation and the Tax Commission are not included in NRS 233B.039's exemption provision and none of the statutory provisions listed as prevailing over NRS Chapter 233B apply.

In 1989, after the *Saveway* decision, the Legislature removed language from NRS 233B.130(1) that stated the APA ''does not limit utilization of trial de novo to review a final decision [of the

agency] where provided by statute, but this chapter provides an alternative means of review in those cases.'' 1989 Nev. Stat., ch. 716, § 6, at 1651. The Legislature also added NRS 233B.130(6), which provides: ''[t]he provisions of this chapter are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which this chapter applies.'' *Id.* at 1652.

Richard Campbell, the chairman of the state bar's administrative law committee explained the rationale for the changes:

> [Campbell] indicated one problem with administrative law is that each agency has its own judicial review provision but it is incomplete and contains no provision for procedures before the courts. [Campbell] also pointed out it is not clear whether NRS 233[B] or the agency's law applies thereby creating general confusion among practitioners and the courts. [Campbell] indicated he spoke with several judges who urged the Administrative Law Committee to clarify such procedures.

Hearing on A.B. 884 Before the Assembly Governmental Affairs Comm., 65th Leg., (Nev., June 6, 1989).

Thereafter, in 1997, the Legislature also added the following language to NRS 360.245:[3] ''A decision of the Nevada Tax Commission is a final decision *for the purposes of judicial review*. The Executive Director or any other employee or representative of the Department shall not seek judicial review of such a decision.'' (Emphasis added.) Thus, when NRS 360.245(5) is read together with NRS 233B.130(6), it indicates that it was the intent of the Legislature that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B.

Senate Bill (S.B.) 362 amended the language of NRS 372.680 to reflect the need for a final decision from the Nevada Tax Commission before seeking judicial relief:

> 1. Within 90 days after ~~[the mailing of the notice of the department's action]~~ **a final decision** upon a claim filed pursuant to this chapter ~~[,]~~ **is rendered by the Nevada tax commission,** the claimant may bring an action against the department on the grounds set forth in the claim in a court of competent jurisdiction in Carson City**, the county of this state where the claimant resides or maintains his principal place of business or a county in which any relevant proceedings were conducted by the department,** for the recov-

[3]NRS Chapter 360 contains general provisions pertaining to Nevada's revenue and taxation statutes. When the quoted language was added, it was designated as NRS 360.245(4). 1997 Nev. Stat., ch. 547, § 4, at 2595. The language is now designated as NRS 360.245(5), and we will refer to it as such in this opinion. *See* 1999 Nev. Stat., ch. 484, § 4, at 2481.

> ery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> 2. Failure to bring **an** action within the time specified constitutes a waiver of any demand against the state on account of alleged overpayments.

1999 Nev. Stat., ch. 484, § 33, at 2495 (bold indicates language added and strikethrough indicates language removed). A staff summary, prepared by a staff member of the committee, considered by the Assembly Committee on Taxation explained that the amendments to NRS 372.680 ''[p]rovide[ ] that an action for judicial review of a claim for refund of sales tax follows a decision of the [Commission], not the [Department], and that such action may be brought in a court in Clark County as well as Carson City.'' Hearing on S.B. 362 Before the Assembly Taxation Comm., 70th Leg. (Nev., May 6, 1999), Exhibit G. S.B. 362 was approved by the Assembly and Senate without any specific remarks.

In a memorandum to the Assembly Judiciary Committee Chairman regarding S.B. 362, the Office of the Attorney General stated:

> Prior to S.B. 362, refund claims had not been subject to the requirements of chapter 233B of the Nevada Revised Statutes. . . . In the event that S.B. 362 becomes law, . . . after a Tax Commission decision, the taxpayer may file a petition with a district court in a judicial review proceeding. It is this filing of a petition for judicial review which is the subject of the venue provisions in S.B. 362. Thus, S.B. 362 contemplates a change from past practice where refund claims upon passage of S.B. 362 will now be subject to the requirements of Chapter 233B of the Nevada Revised Statutes.

Memorandum dated May 7, 1999, to Assemblyman Bernie Anderson, Chairman, Assembly Committee on Judiciary, from Norm Azevedo, Senior Deputy Attorney General.

The deputy attorney general who wrote the memorandum also gave testimony to the Senate Committee on Taxation:

> [He] said this particular provision was addressed in NRS chapter 23[3]B and he did not see a problem with it being brought to other courts in the state. He explained the purpose of this bill and what it would achieve. He said the amendments clarified the language with great specificity so that in almost every instance the sequence would be a hearing officer, the tax commission, and, if it went to court, it would be pursuant to NRS chapter 233B in the form of a petition for judicial review. He said NRS chapter 233B would address most sales- and use-tax statutes that go to the commission.[4]

[4]The court is aware that Mr. Azevedo now represents Edison in this matter. However, his comments to the Legislature were made in his capacity as a deputy attorney general.

Hearing on S.B. 362 Before the Senate Taxation Comm., 70th Leg. (Nev., March 23, 1999). Based on this testimony, every legislator at that committee meeting was made aware that the amendment to NRS 372.680 would be interpreted by the Attorney General's office and the Department to include a judicial review standard for appealing a decision of the Commission and approved it.

It is clear from NRS 372.680, S.B. 362, and the larger statutory schemes that the intent of NRS 372.680, as amended, was to provide for judicial review of the Commission's final decisions. The legislative history indicates that the Legislature intended for the judicial remedies contemplated in NRS 372.680 to proceed under the standards set forth in NRS Chapter 233B. Based on the legislative history of S.B. 362, the statutory intent was clearly expressed in the memorandum and testimony that resulted in overwhelming approval of the bill. Appeals from decisions of the Commission should be by way of judicial review and not trial de novo.

[Headnotes 8, 9]

Therefore, we conclude that NRS 372.680 now contemplates judicial review, in accordance with NRS Chapter 233B, and a petition for judicial review under those statutes is the sole remedy after a final decision by the Commission in regard to a sales and use tax refund matter.

Judicial estoppel

[Headnote 10]

Although the proper means of seeking review of the Commission's decision is by means of a petition for judicial review, we conclude that, in this instance, Edison's refund claims should nevertheless proceed as a trial de novo. The Department is judicially estopped from asserting that the only remedy available to Edison is judicial review.

[Headnotes 11-14]

Judicial estoppel applies to protect the judiciary's integrity and prevents a party from taking inconsistent positions by '' 'intentional wrongdoing or an attempt to obtain an unfair advantage.' '' *NOLM, LLC v. County of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004) (quoting *Kitty-Anne Music Co. v. Swan*, 4 Cal. Rptr. 3d 796, 800 (Ct. App. 2003)). This court may invoke the doctrine at its discretion. *Id.* Judicial estoppel, however, does not preclude a change in position that is not intended to sabotage the judicial process. *Id.* Judicial estoppel may apply when

> ''(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first

> position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.''

Id. (quoting *Furia v. Helm*, 4 Cal. Rptr. 3d 357, 368 (Ct. App. 2003)).

Both now and in the past, the Department has taken totally inconsistent positions in quasi-judicial administrative proceedings regarding the proper procedure for a taxpayer who wishes to challenge the Department's denial of a refund claim. The Department took the position in its brief to the Commission that

> [i]f Edison believes, following the Commission's review of this matter, that the administrative record is deficient in some respect, it may exercise its right to file a law suit against the Department under NRS 372.680. Unlike NRS 361.420, which addresses appeals from decisions of the State Board of Equalization, NRS 372.680 in [no] way purports to limit the district court's review to the administrative record on appeal. Consequently Edison would have an opportunity before the district court to more fully develop the facts, if appropriate.

This position is further maintained by an administrative law judge from the Department stated in a letter to the parties' counsel that, ''[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time.'' There is nothing in the record to suggest that the Department's original position was due to ignorance, fraud, or mistake.

Furthermore, it would be highly inequitable to now allow the Department to change its position with respect to this taxpayer. Therefore, although tax refund claims typically must proceed in the district court under the APA, we conclude that the district court erred when it allowed the Department to assert a position contrary to the one it took earlier in this case when it stated that Edison would be allowed a trial de novo in the district court.[5]

Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to va-

[5]For the same reason, the Department's argument that res judicata, or claim preclusion, bars Edison from seeking a refund in a district court trial de novo fails. If, as the Department indicated before, NRS 372.680 provided for a trial de novo, then claim preclusion could not be used to contravene the Legislature's policy decision. In any event, claim preclusion will not be applied when the party seeking its benefit has actively encouraged the actions of the party against whom it would be invoked. *See Campbell v. State, Dep't of Taxation*, 108 Nev. 215, 219, 827 P.2d 833, 836 (1992) (refusing to apply claim preclusion when the taxpayers lost any opportunity to reclaim taxes paid by following the Tax Department's incomplete advice).

cate its order that provides that the matter will proceed as an NRS Chapter 233B petition for judicial review and to instead allow the matter to proceed as filed, an independent action.

CHERRY, SAITTA, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.